

55 Causes of Action 2d 157 (Originally published in 2012)

Cause of Action for Financial **Elder Abuse** Under State Statute

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Causes of Action Second Series

Database updated March 2015

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### COA2d ACTION GUIDE

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- In order to establish a cause of action for financial **elder abuse**, the plaintiff must prove that:
  - (1) the victim was a qualifying elderly person within the meaning of the abuse statute [§ 6];
  - (2) the defendant wrongfully appropriated the victim's property [§§ 7 to 9]; and
  - (3) the defendant knew, or should have known of the wrongful nature of its conduct [§§ 10, 11].

#### DEFENSES

- There will be no financial **elder abuse** if:
  - (1) the victim was not a qualifying elderly person within the meaning of the **elder-abuse** statute [§ 14];

(2) the defendant successfully rebuts the element of having acted wrongfully [§ 15];

(3) the transfer was made to qualify for Medicaid or the like [§ 16];

(4) the victim consented to the defendant's actions [§ 17];

(5) the defendant has an immunity or privilege under state law [§ 18];

(6) the claim is preempted by federal law [§ 19]; or

(7) the claim is subject to arbitration [§ 20].

## **PARTIES**

- An action for financial **elder abuse** may be brought by the elderly victim, the person's representative or assignee, or sometimes by the state [§§ 21, 22].
- An action may be brought against the perpetrator of the financial abuse or against one who aids and abets the exploitive conduct [§ 23].

## **JURISDICTION**

- Subject-matter jurisdiction over a claim for financial **elder abuse** is in the state's court of general jurisdiction, or in the federal district court under supplemental jurisdiction to a related federal claim [§ 24].

## **LIMITATIONS**

- The plaintiff in a financial **elder abuse** case typically must file its complaint within a statutorily prescribed number of years after the plaintiff discovers, or through the exercise of reasonable diligence should have discovered, the facts constituting the abuse [§ 26].

## **REMEDIES**

- The plaintiff may obtain various remedies for financial **elder abuse**, including:

(1) compensatory damages, including noneconomic damages for pain and suffering [§§ 31, 33];

(2) equitable remedies, such as rescission of exploitive contracts [[§ 34](#)];

(3) enhanced damages, such as punitive or treble damages [ §§ [35](#), [36](#)];

(4) attorney's fees [[§ 37](#)].

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## I. Introduction

### § 1. Scope

This article discusses the elements of a cause of action by, or on behalf of, a victim of financial **elder abuse**, seeking compensation or other relief. As to claims grounded on financial exploitation of elderly persons in connection with real estate transactions, see [Cause of Action in Tort for Wrongful Foreclosure of Residential Mortgage, 52 Causes of Action 2d 119](#), and [Cause of Action for Reverse Redlining or Predatory Home Mortgage Lending Under Fair Housing Act \[42 U.S.C.A. § 3605\], 49 Causes of Action 2d 209](#). Outside the scope of the article are claims alleging other theories of recovery—such as common-law claims for torts of fraud, breach of contract, or breach of fiduciary duty, or statutory claims grounded in a state's consumer protection laws.

To establish a cause of action for financial **elder abuse**, the plaintiff must prove that the victim was a qualifying elderly person and that the defendant knowingly engaged in wrongful appropriation of the victim's property, typically through undue influence or fraud, §§ [5 to 12](#). Defenses to the claim are discussed in §§ [13 to 20](#). Persons who may bring a financial **elder abuse** claim and persons against whom such a claim may be brought are identified in §§ [21 to 23](#). General procedural matters are treated in §§ [24 to 28](#). Matters of proof are discussed in §§ [29, 30](#). Remedies are considered in §§ [31 to 37](#).

#### Note:

A number of jurisdictions may have rules, regulations, constitutional provisions, or legislative enactments directly bearing upon this subject. The reader is consequently advised to consult the appropriate statutory or regulatory compilations to ascertain the current status of all statutes discussed.

### § 2. Background

The purpose of an **elder abuse** act is to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse, including financial exploitation. *In re Estate of Dito*, 198 Cal. App. 4th 791, 130 Cal. Rptr. 3d 279 (1st Dist. 2011), as modified, (Aug. 23, 2011); *In re Estate of Winn*, 214 Ariz. 149, 150 P.3d 236 (2007). With the recent rise in the elderly population, the scourge of financial **elder abuse** is beginning to receive some attention from some state legislatures, which have enacted statutory causes of action with heightened remedies for acts of egregious abuse against elder and dependent adults. *Negrete v. Fidelity and Guar. Life Ins. Co.*, 444 F. Supp. 2d 998 (C.D. Cal. 2006). A victim may not even realize that he or she is being abused or exploited, particularly when the issue is financial exploitation and the victim is willingly parting with money or property. Although exploitation may occur with the full participation of the victim, it is no less exploitation. *Davis v. Zlatos*, 211 Ariz. 519, 123 P.3d 1156 (Ct. App. Div. 1 2005). See Shelby A.D. Moore and Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly From Financial Abuse*, 41 San Diego L. Rev. 505 (2004).

A state's **elder abuse** act may create an independent cause of action, in addition to encouraging attorneys to bring suit under existing law, which may provide enhanced remedies, such as attorney's fees. *Perlin v. Fountain View Management, Inc.*, 163 Cal. App. 4th 657, 77 Cal. Rptr. 3d 743 (2d Dist. 2008); *Rand v. American Nat. Ins. Co.*, 2009 WL 2252115 (N.D. Cal. 2009). One type of claim for financial **elder abuse** is in the form of a private right of action under the state's deceptive trade practices act, coupled with statutory enhanced damages specifically for elderly or other vulnerable adults. See, e.g., *Del. Code Ann. tit. 6, § 2583(a)*. In some jurisdictions, however, an **elder abuse** statute does not create a private cause of action merely by requiring the reporting of **elder abuse** and setting out procedures to be taken if a report is received by the Department of Health and Social Services. *Hymes v. DeRamus*, 222 P.3d 874 (Alaska 2010) (Alaska Stat. § 47.24.010, Alaska Stat. § 47.24.013(a), Alaska Stat. § 47.24.015(a)). Some plaintiffs have pursued claims under elder-protection statute statutes that do not expressly provide a cause of action, but do contain a section that defines financial exploitation. *Wong v. Nieboer*, 2006 Mass. App. Div. 67, 2006 WL 1172191 (2006).

### Illustration:

In a Massachusetts case, the plaintiffs brought a financial **elder abuse** claim on the basis of an elder protection statute that defined "abuse" to include an act or omission that results in financial exploitation of an elderly person. "Financial exploitation" is defined the statute as an act or omission that causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to the other person. The law requires that the gain would otherwise benefit the elderly person absent the act or omission of that other person. However, it is expressly provided under the statute that financial exploitation does not occur if the elderly person knowingly consented, unless the consent was a consequence of misrepresentation, undue influence, coercion, or threat of force. *Wong v. Nieboer*, 2006 Mass. App. Div. 67, 2006 WL 1172191 (2006) (the plaintiffs relied on *Mass. Gen. Laws Ann. ch. 19A, § 14*).

The elements of a cause of action under an **elder abuse** act are statutory, and reflect the legislature's intent to encourage private, civil enforcement of the law. *In re National Western Life Ins. Deferred Annuities Litigation*, 268 F.R.D. 652 (S.D. Cal. 2010); *Intrieri v. Superior Court*, 117 Cal. App. 4th 72, 12 Cal. Rptr. 3d 97 (6th Dist. 2004). Many states have enacted statutes specifically to protect elderly and other vulnerable adults from abuse and exploitation, including financial abuse. *Estate of McGill ex rel. McGill v. Albrecht*, 203 Ariz. 525, 57 P.3d 384 (2002). For example, an express private right of action for financial **elder abuse** is recognized in Oregon. *Or. Rev. Stat. § 124.100(2)*. Such laws are intended to increase the remedies available to, and for, elderly people who had been harmed by their caregivers. *In re Estate of Wytttenbach*, 219 Ariz. 120, 193 P.3d 814 (Ct. App. Div. 1 2008). For example, a Washington State appellate court has noted that when the legislature adopted the Abuse of Vulnerable Adults Act, Wash. Rev. Code Ann. §§ 74.34.0001 to 74.34.902, it created a new cause of action to protect vulnerable adults from abandonment, abuse, financial exploitation, or neglect. *Wash. Rev. Code Ann. § 74.34.200*. Financial **elder abuse** statutes are remedial in nature and thus should be construed broadly to effectuate the legislature's purpose in enacting them. *In re Estate of Winn*, 214 Ariz. 149, 150 P.3d 236 (2007). Specifically, courts should give effect to all their provisions that provide civil and criminal penalties for persons in a position of trust and confidence who financially exploit an incapacitated or vulnerable adult. *In re Estate of Wytttenbach*, 219 Ariz. 120, 193 P.3d 814 (Ct. App. Div. 1 2008).



### § 3. Related and alternative actions—Generally

Several alternative theories may be available to the plaintiff, whether or not a statutory cause of action for **elder abuse** is also cognizable in their jurisdiction. For example, the emotional toll suffered by elderly person who have lost major assets—such as real estate—to swindlers makes a claim for negligent or intentional infliction of emotional distress very appealing. [Cirella v. Medici, 2007 WL 5312724 \(Mass. Super. Ct. 2007\)](#).

#### Illustration:

In Massachusetts, a 90-year-old man brought an action against the defendants, a husband and wife who owned and operated a retirement home in the area and had befriended the plaintiff and grown close to him over several years, but eventually exploited him financially. The plaintiff sued on several theories: fraud, undue influence, breach of contract, breach of fiduciary duty, breach of “confidential duty,” negligent infliction of emotional distress, and intentional infliction of emotional distress. The plaintiff essentially alleged that the couple took advantage of his advanced age to take control of his finances and extract money from him that they failed to repay. He also asserted that due to the defendants' actions, his credit was ruined, his overall finances were in a chaotic state with an unwanted mortgage and several judgments against him, and that the defendants' extreme and outrageous conduct caused him severe emotional distress. With respect to the intentional infliction of emotional distress claim, the court found that the defendants knew or should have known that their conduct in extracting loans from the plaintiff would cause him to suffer emotional distress. Furthermore, their deceitful conduct in so dealing with an elderly man who was unable to protect himself and deal with the finances in a capable and intelligent way was extreme and outrageous, “beyond all possible bounds of decency and utterly intolerable in a civilized community.” In addition, the defendants' actions were the cause of the plaintiff's distress, which was severe and of a nature that no reasonable person could be expected to endure. The plaintiff's emotional distress included an inability to sleep, extreme anxiety, confusion, fear of losing his home of 37 years, and despair and humiliation over potentially leaving his daughter to deal with the consequences of his debt. His suffering lasted for several years, and in light of the plaintiff's advanced age, the defendants well knew that he would be particularly susceptible to the infliction of emotional distress. The court awarded damages of \$75,000 jointly and severally against the defendants on this claim. [Cirella v. Medici, 2007 WL 5312724 \(Mass. Super. Ct. 2007\)](#).

An alternative claim for undue influence is very commonly alleged along with a cause of action for financial **elder abuse**. [Estate of Hoch v. Stifel, 2011 ME 24, 16 A.3d 137 \(Me. 2011\)](#) (an action by the patient's estate against the patient's former caregivers, alleging undue influence, conspiracy, and fraud in regard to certain of patient's monetary and property transfers). In some states, undue influence may be available as a statutory cause of action seeking to rescind a contract. See [Gwin v. Pacific Coast Financial Services, 2010 WL 1691567 \(S.D. Cal. 2010\)](#), which alleged a violation of [Cal. Civ. Code § 1575](#), in which the court found that the plaintiff failed to allege sufficient facts to make out any of the statutory forms of undue influence.

Another common alternative claim is the defendant's breach of a fiduciary relationship toward the plaintiff, such as by a family member or a guardian. [Knox v. Dean, 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 \(4th Dist. 2012\)](#).

#### Illustration:

A guardian ad litem's allegations that an elderly adult's former conservator breached his fiduciary duty to the adult were sufficient to state a cause of action for breach of fiduciary duty. The allegations included that the conservator committed waste by failing to rent the adult's apartments, failed to repair the apartments so they could be rented, allowed the apartments to deteriorate, allowed a caregiver to live rent free in one apartment, allowed friends to rent other apartments at below-market rates, and paid for unnecessary services or services that were not actually performed, all of which resulted in losses to the estate. [Knox v. Dean, 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 \(4th Dist. 2012\)](#).

An alternative cause of action may be available that allows a financially-exploited elderly plaintiff to pursue equitable remedies—such as reformation or rescission of a contract—outside the financial **elder abuse** statute itself. See the discussion under “Remedies” in § 34.

#### § 4. Related and alternative actions—Whistle-blower protection

The policy of preventing **elder abuse** is furthered when persons who speak up about particular cases of abuse are safeguarded from being penalized for their courageous actions. A related cause of action may be available against an employer by an employee who is fired in retaliation for reporting the employer's physical or financial abuse of an elderly victim. For example, in Illinois, an employee of a not-for-profit corporation had a private right of action against the employer for retaliatory discharge under the state's **Elder Abuse** and Neglect Act, after the employee was terminated for “blowing the whistle” on a co-employee who was eventually convicted of criminal offenses. The court explained that an implied private cause of action was the only method by which the employee, who was involved in providing services to victims of **elder abuse** and neglect, could seek a remedy for discrimination by her employer. *King v. Senior Services Associates, Inc.*, 341 Ill. App. 3d 264, 275 Ill. Dec. 181, 792 N.E.2d 412 (2d Dist. 2003) (applying IL ST CH 320 § 20/3(a)).

Employees have not, however, always fared so well. For example, in a Kansas case, the court ruled that an employee was not terminated solely in retaliation for her reporting of **elder abuse** because the way in which she made her report to Adult Protective Services violated the employer's policies. In particular, the employee—suspecting that a customer was the victim of **elder abuse**—used a company computer to access the protective services Web site and called it from her work phone to report the incident. The employee's unauthorized use of a company computer and making an unauthorized long distance telephone call violated company policies and provided the employer a legal basis for discharging the employee. *Poull v. Affinitas Kansas, Inc.*, 228 P.3d 441 (Kan. Ct. App. 2010), unpublished and unpublished and unpublished (unreported opinion).

## II. Substantive Law Overview

### A. Prima Facie Case of Financial **Elder Abuse**

#### § 5. Elements of prima facie case of financial **elder abuse**, generally

The plaintiff asserting a financial **elder abuse** under a state statute will typically need to show that the victim was “elderly” within meaning of statute, § 6; the defendant wrongfully appropriated the victim's property, ordinarily through fraud or undue influence, §§ 7 to 9; and the defendant had either actual or constructive knowledge that the actions were wrongful, §§ 10, 11.

Financial abuse of an elder victim ordinarily requires that a person or entity takes, secretes, appropriates, or retains property of the victim, or assists with the taking, secreting, appropriating, or retention of property, for a wrongful use or with intent to defraud. *Knox v. Dean*, 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 (4th Dist. 2012) (exploitation of victim's property by caregiver); *Bonfigli v. Strachan*, 192 Cal. App. 4th 1302, 122 Cal. Rptr. 3d 447 (1st Dist. 2011), as modified on denial of reh'g, (Mar. 24, 2011); *Hoffart v. Wiggins*, 226 Or. App. 545, 204 P.3d 173 (2009) (wrongful retention). Assisting another in performing any of these actions will suffice to create liability as well. Cal. Welf. & Inst. Code § 15610.30(a)(2), (3). A claim of financial **elder abuse** arises when an elder or dependent adult is deprived of any property right, whether or not the property is held directly by the victim or the victim's representative. The claim may arise therefore by means of any agreement, donative transfer, or testamentary bequest. Cal. Welf. & Inst. Code § 15610.30(c). The claim is often statutorily defined in the alternative as taking or retaining property either for a wrongful use or with a fraudulent intent. Cal. Welf. & Inst. Code § 15610.30(a)(1); 34 V.I.C. § 470(a). Thus, a claim typically does not require a fraudulent intent.

#### § 6. Victim was “elderly” within meaning of statute

Typically, counsel for the plaintiff will need to examine the **elder abuse** statute to determine whether the client met the age threshold for protected status at the time of the alleged misconduct. The threshold is typically 65 years of age. See, e.g., [Or. Rev. Stat. § 124.100\(1\)\(a\)](#); [Cal. Welf. & Inst. Code § 15610.27](#). Some states, however, set the “elderly” cut-off at only 60 years of age. [Nev. Rev. Stat. Ann. § 41.1395](#); [Tenn. Code Ann. § 71-6-120\(a\)\(3\)](#). Some financial **elder abuse** statutes may not expressly cover the elderly. However, a “vulnerable” person may be defined in a manner that will cover a particular elderly person, depending on the circumstances.

#### Illustration:

In Arizona, a “vulnerable adult” means a person 18 years of age or older who is “unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment.” [Ariz. Rev. Stat. Ann. § 46-451\(10\)](#).

Some financial exploitation statutes may require that the victim have some mental or physical dysfunction in addition to being elderly, including any dysfunction resulting from age. [Tenn. Code Ann. § 71-6-120\(a\)\(3\)](#). Thus, under some statutes the elderly person will need to satisfy the requirement of being a “vulnerable” adult. See, e.g., [Or. Rev. Stat. § 124.100\(1\)\(a\)](#); [Fla. Stat. Ann. § 415.102](#). In one case, the court granted the defendants' motion to dismiss the plaintiffs' claim because the plaintiffs failed to allege that the elderly victim was a “vulnerable adult” under the Florida Adult Protective Services Act. The plaintiff had failed to allege that his “ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.” [Migliaccio v. Midland Nat. Life Ins. Co.](#), 2007 WL 316873 (C.D. Cal. 2007).

#### Illustration:

Under Washington State's scheme: “[i]n addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby.” [Wash. Rev. Code Ann. § 74.34.200\(1\)](#).

### § 7. Wrongful taking of property—Generally

For purposes of a financial **elder abuse** claim, the “wrongful” taking of money, is a taking in pursuit of an improper motive or by improper means. [Church v. Woods](#), 190 Or. App. 112, 77 P.3d 1150 (2003). Acts of simple or even gross negligence will not suffice to establish financial **elder abuse**. [Berkley v. Dowds](#), 152 Cal. App. 4th 518, 61 Cal. Rptr. 3d 304 (2d Dist. 2007).

The taking of property is not always a simple transfer or withdrawal of funds. It may take the form of a transfer of an interest, as in the case of title to real property. For example, under Oregon's **elder abuse** statute, obtaining a joint interest in real property from an elderly, incapacitated transferor is a “taking” of property, for purposes of establishing a statutory claim for financial abuse of an elderly or incapacitated person. The conveyance transferred an undivided interest in the transferor's property to his grandniece, and it diminished the transferor's interest commensurately. [Church v. Woods](#), 190 Or. App. 112, 77 P.3d 1150 (2003). If the statutory term “wrongful” is not defined in the governing statute, the court may look to other sources for the meaning, including dictionary definitions or well-established understandings from substantive areas of law, such as torts. For example, in tort law an interference with legal interests is “wrongful” if it is carried out in pursuit of an improper motive or by improper means, which must be independently wrongful by reason of statutory or common law, beyond the mere fact of the injury complained of. A “wrongful” taking of an elderly person's money or property has a dual meaning, focusing alternatively on the defendant's motives or the means by which property was taken. [Church v. Woods](#), 190 Or. App. 112, 77 P.3d 1150 (2003). See [Cause of Action to Set Aside or Recover for Fraudulent Transfer or Obligation under Uniform Fraudulent Transfer Act](#), 26 Causes of Action 773.

### Illustration:

In *Church*, remand of the financial abuse claim brought by the personal representative of the elderly transferor's estate was required to permit the trial court to determine whether the transferor's grandniece acted wrongfully in obtaining an interest in the real and personal property. In February 2000, the victim was an 83-year-old bachelor with no children who lived with the plaintiff, his brother, near Christmas Valley. The victim had prostate cancer, became easily disoriented, and relied heavily on his family for his daily care. Concerned about the victim's mental health, the plaintiff took the victim to a neurologist, who diagnosed him with moderate to severe Alzheimer's disease. Soon after, the plaintiff needed to conduct some personal business away from home and arranged for the victim to stay with the defendant, the victim's grandniece for a few days, at her home. The plaintiff told the defendant that the victim had Alzheimer's disease. A few days later, the defendant drove the victim to various locations, where, with her assistance, he conducted a number of transactions. For example, the defendant helped him obtain an Oregon DMV identification card, which listed the defendant's residence as the victim's address. While at the DMV office, the victim transferred the title to one of his vehicles to the defendant, and he added her name to the titles of his two other vehicles. The defendant also took the victim to his bank, where he added her name to his checking account, giving the defendant the authority to write checks against the account and a right of survivorship. That same day, after examining the recorded deed to certain real property that the victim owned, the defendant purchased a form for a bargain and sale deed at a legal stationery store and filled it out so that, when executed by the victim, it would grant her co-ownership in that real property with a right of survivorship. The defendant also filled out a form whereby the victim would grant her a power of attorney. Later that evening, she drove the victim to the residence of a notary public, in whose presence the victim signed the deed and the power of attorney. When the plaintiff picked the victim up two days later, the defendant did not tell him about the property transfers or the power of attorney; however, the plaintiff eventually learned of them. In May 2000, the plaintiff, through an attorney, sent the defendant two letters asking her to relinquish her interests in the victim's real property, but the defendant did not respond. In October 2000, the circuit court appointed the plaintiff as guardian and conservator, and, acting in that capacity, the plaintiff filed this action. The victim died in August 2001, and the plaintiff thereafter was appointed as personal representative of his estate. In his second amended complaint, the plaintiff was named as personal representative. After a bench trial, the court found that the victim had lacked the capacity to execute the transactions described above, and the court rescinded them. However, the court dismissed the financial abuse claim, concluding that "there was neither a 'taking' nor an 'appropriation' of property within the meaning of the financial **elder abuse** statute." The court also dismissed the claim for rescission based on undue influence. The plaintiff appealed only the dismissal of the financial abuse claim. The defendant did not cross-appeal from the portion of the judgment granting rescission on the ground that the victim lacked capacity to make the transfers. [Church v. Woods, 190 Or. App. 112, 77 P.3d 1150 \(2003\)](#).

The statute may require a deprivation of real or personal property. Thus, for example, the denial of a contractual opportunity, such as the chance to work a certain number of hours, may not qualify. For example, under California law, an employer's alleged breach of a promise to provide an employee with sufficient hours to permit him to maintain full-time work status, and thereby maintain his insurance benefits, did not amount to "financial abuse" under California's **elder abuse** statute, as the employee was paid for all hours he worked, and claimed only that the breach resulted in lost future wages. According to the court, the statute at issue, [Cal. Welf. & Inst. Code § 15610.30](#), refers to "real or personal property," and under general California law, "real property" is coextensive with lands, tenements, and hereditaments" and " 'personal property' include money, goods, chattels, things in action, and evidences of debt." The court noted that the plaintiff's allegations did not qualify as either. [Hardin v. Wal-Mart Stores, Inc., 813 F. Supp. 2d 1167 \(E.D. Cal. 2011\) \(applying California law\)](#).

Property of an elderly person may be misappropriated through the retention of assets that were lawfully in the defendant's possession. A common factual setting is an investment professional who holds funds in an account under the elderly person's name. Thus, an action alleging the wrongful retention of money by an investment broker, pursuant to an Oregon statute prohibiting the financial abuse of a "vulnerable" person did not require the plaintiffs to prove that the broker wrongfully took or appropriated the money, as a wrongful retention of funds was sufficient under the statute. The plaintiff-couple, whose ages

were not disclosed in the court opinion, alleged that the broker had refused to return all monies owed to them as provided for in their contract. [Hoffart v. Wiggins](#), 226 Or. App. 545, 204 P.3d 173 (2009).

A financial **elder abuse** claim may arise from misconduct by an insurer issuing or terminating an insurance policy. For example, a court declined to grant the defendants' motions to dismiss financial **elder abuse** claims for failing to state a cause of action, as the complaint sufficiently alleged that the defendants' bad-faith termination of insurance policies allowed them to retain the economic benefits of seven years of premiums, charges, and costs paid under the policies. The plaintiff also argued that their financial interest in the policies was personal property and the defendants acted wrongfully and deceptively in terminating those policies. The plaintiffs alleged that one of the insurance companies falsely informed them that there would be no change in the policies and had continued to collect fees for a year before terminating the policies and failing to offer comparable ones. The court thus rejected the defendants' contention that they did not take, secrete, appropriate, or retain the plaintiffs' property for a wrongful use or with an intent to defraud, within the meaning of the **elder abuse** statute. [Fischer v. Aviva Life and Annuity Co.](#), 2010 WL 3582559 (E.D. Cal. 2010). An allegation that an insurer engaged in a scheme of using deceptive practices to deplete the accumulated cash value of senior citizens' existing life insurance policies or annuities to finance purchase of its deferred annuities that would not mature until after their actuarial life expectancy was sufficient to state a claim for violation of California's Financial **Elder Abuse** Laws, despite the insurer's contention that the seniors engaged in an arms' length commercial transactions and could have demanded return of the funds at any time. [Negrete v. Fidelity and Guar. Life Ins. Co.](#), 444 F. Supp. 2d 998 (C.D. Cal. 2006).

### **§ 8. Wrongful taking of property—Undue influence**

A claim for financial **elder abuse** may be stated if the act was done through the use of undue influence. [Cal. Welf. & Inst. Code § 15610.30\(a\)\(3\)](#). In some jurisdictions, the statute requires that the defendant have been in a position of trust and confidence with the elderly victim. [Ariz. Rev. Stat. Ann. § 46-456\(B\)](#). Thus, under Arizona's financial **elder abuse** law, a position of trust and confidence is held by a person who is in a confidential relationship with the vulnerable adult, has assumed a duty to provide care to the person, or is in a fiduciary relationship with him or her. A de facto guardian or de facto conservator qualifies. [Ariz. Rev. Stat. Ann. § 46-456\(I\)\(4\)](#). The issue of whether a confidential relationship exists is a question of fact to be decided by the court based on the totality of the circumstances. [Ariz. Rev. Stat. Ann. § 46-456\(I\)\(4\)](#). Family members are deemed to be in a position of trust and confidence. [In re Estate of Newman](#), 219 Ariz. 260, 196 P.3d 863 (Ct. App. Div. 1 2008), as amended, (July 17, 2008). In Arizona, "[a] person who is in a position of trust and confidence to a vulnerable adult shall use the vulnerable adult's assets solely for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence to the vulnerable adult or the person's relatives." [Ariz. Rev. Stat. Ann. § 46-456\(A\)](#). The law provides an exception for court-approved transactions, as well as those that are specifically authorized in a valid durable power of attorney that is executed by the vulnerable adult as the principal or in a valid trust instrument that is executed by the vulnerable adult as a settlor. [Ariz. Rev. Stat. Ann. § 46-456\(A\)\(1\), \(2\)](#).

#### **Illustration:**

An elderly woman's caretaker, who was in a position of trust and confidence, violated Arizona's Adult Protective Services Act by failing to act for the benefit of the elderly woman, who was a vulnerable adult, to the same extent as a trustee. The caretaker, who was paid reasonable compensation for his services, accepted loans, gifts of money, and real estate from the woman without advising her to seek the help of a family member or a lawyer, and the loans and gifts did not benefit the elderly woman. [Davis v. Zlatos](#), 211 Ariz. 519, 123 P.3d 1156 (Ct. App. Div. 1 2005).

A relationship of trust and confidence may derive not only from caretaking or family membership, but from financial or legal arrangements. Thus, in Arizona, for example, a relationship of trust and confidence is established by a joint tenancy or a tenancy in common with a vulnerable adult. [Ariz. Rev. Stat. Ann. § 46-456\(I\)\(4\)](#).



The use of undue influence constitutes taking property by “improper means” because it involves procuring an unfair advantage. *Church v. Woods*, 190 Or. App. 112, 77 P.3d 1150 (2003). This principle follows from the fact that the emphasis in undue influence cases should be on the unfairness of the advantage that is reaped as a result of wrongful conduct. *Smith v. Ellison*, 171 Or. App. 289, 15 P.3d 67 (2000). Under some statutes, a wrongful taking of property by someone who is in a fiduciary relationship with the elderly victim may be actionable under the state’s financial **elder abuse** statute. A triable issue must be raised that there was a legally recognized fiduciary relationship under the clear language of the governing statute. *White v. McCabe*, 159 Or. App. 189, 979 P.2d 289 (1999) (construing Or. Rev. Stat. § 124.110).

#### Illustration:

In an Oregon case, the absence of evidence that a home purchaser had a fiduciary relationship with the elderly vendor meant the vendor could not maintain a claim under Oregon’s **elder abuse** statute for the allegedly inadequate purchase price of the home. The statute recognized a cause of action for financial **elder abuse** “[w]hen a person, including but not limited to a person who has the care or custody of an elderly or incapacitated person or who stands in a position of trust to an elderly or incapacitated person, takes or appropriates money or property of the elderly or incapacitated person for any wrongful use or for any purpose not in the due and lawful execution of the trust or duty of the person.” Although the plain language of the introductory clause of the statute provided that it applies in cases of fiduciary abuse, the plaintiff conceded that no classical fiduciary relationship ever existed between the defendant (or his agent) and the plaintiff. Although she urged the court to consider the legislative history of the statute, the plaintiff conceded that the statute did not possess the ambiguity necessary to permit that analysis under applicable case law. Accordingly, since there was no evidence of a fiduciary relationship as required by the plain language of the statute, the appellate court conclude that the trial court did not err in granting the defendant’s motion for summary judgment on the **elder abuse** claim. *White v. McCabe*, 159 Or. App. 189, 979 P.2d 289 (1999) (construing Or. Rev. Stat. § 124.110).

### § 9. Wrongful taking of property—Bad faith

Financial abuse of elderly or dependent adults often involves actions taken in bad faith. Or. Rev. Stat. § 124.110 (failing in bad faith to transfer funds to the victim); 34 V.I.C. § 470(b); *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696 (3d Dist. 2009). Bad faith means that the person or entity knew or should have known that the victim had the right to have the property transferred or made readily available to the victim or the victim’s representative. 34 V.I.C. § 470(c). As to the applicable reasonable-person standard, a person or entity should have known of the statutory right of the victim if, on the basis of the information received by the person or entity or an authorized third party, it was obvious to a reasonable person that the elder or dependent adult had the specified statutory right. 34 V.I.C. § 470(d). Although bad faith is not required, there must still be an allegation of some wrongful act. *Stebly v. Litton Loan Servicing, LLP*, 202 Cal. App. 4th 522, 134 Cal. Rptr. 3d 604 (3d Dist. 2011), review denied, (Mar. 14, 2012) and unpublished/noncitable and unpublished/noncitable (unpublished opinion).

#### Illustration:

In *Stebly*, home mortgagors—one of whom suffered from multiple sclerosis and was therefore a “dependent adult” under the governing statute—brought a wrongful foreclosure action against the mortgagee defendants, who allegedly abruptly foreclosed before informing them of any decision on whether to grant a loan modification or otherwise refrain from foreclosing. Although the court acknowledged that a wrongful taking may occur in good faith, it emphasized that there was no allegation of a wrongful taking here. The plaintiffs alleged that the defendants abruptly sold the property, causing “undue financial loss” and requiring one of the plaintiffs “to hastily locate an alternative residence that sufficiently provides for her disability.” What “undue” loss was inflicted is not explained, as neither the complaint nor the briefing establishes that plaintiffs lost equity in the property or that there existed any sale proceeds to which plaintiffs were entitled, nor is there any explanation of how acquiring the new residence, however “hastily” located, caused damage. *Stebly v. Litton Loan Servicing, LLP*, 202 Cal. App. 4th 522, 134 Cal. Rptr. 3d 604 (3d Dist. 2011), review denied, (Mar. 14, 2012) and unpublished/noncitable and unpublished/noncitable (unpublished opinion).

### § 10. Acting knowingly—Generally

The plaintiff alleging a financial **elder abuse** cause of action may need to establish that the defendant knew of the wrongful nature of the transaction. [Cruze v. Hudler](#), 246 Or. App. 649, 267 P.3d 176, R.I.C.O. Bus. Disp. Guide (CCH) ¶12148 (2011), opinion adhered to as modified on reconsideration, 248 Or. App. 180, 274 P.3d 858 (2012). A court's finding that the defendant had actual knowledge may be inferred from the fact any person in the defendant's position would have known of the wrongfulness (and therefore, this defendant in fact knew of it). [Wood v. Jamison](#), 167 Cal. App. 4th 156, 83 Cal. Rptr. 3d 877 (2d Dist. 2008). The issue of actual knowledge has arisen in cases of attorneys who are involved in transactions. For example, a trial court's finding that an attorney acted knowingly in assisting one client in taking the proceeds of a loan to another, elderly client, in finding that the attorney committed financial **elder abuse**, was supported by substantial evidence, including evidence that the attorney knew that the entire proceeds of the \$250,000 home mortgage loan he helped the elderly client obtain were to be given to the other client for purposes of a nightclub investment, which any attorney would have known was an inappropriate use of the funds. [Wood v. Jamison](#), 167 Cal. App. 4th 156, 83 Cal. Rptr. 3d 877 (2d Dist. 2008). In cases where the attorney arguably played a more passive role in executing the scheme, a closer examination of the facts may be required to resolve the matter. Thus, a genuine issue of material fact was raised concerning whether an attorney, who was a partner in an allegedly fraudulent property development company, merely received fraudulent financial figures from others and acted as a scrivener as to those numbers in preparing a covenant agreement in which investors were induced to invest in a fraudulent property development scheme, or whether the attorney had actual knowledge that the figures were fraudulent, precluding summary judgment in an action brought by investors against the attorney for fraud and **elder abuse**. [Cruze v. Hudler](#), 246 Or. App. 649, 267 P.3d 176, R.I.C.O. Bus. Disp. Guide (CCH) ¶12148 (2011), opinion adhered to as modified on reconsideration, 248 Or. App. 180, 274 P.3d 858 (2012).

Elderly victims who have been defrauded may meet with difficulty in suing financial institutions that innocently facilitated the fraud by carrying out the victim's instructions. For example, the plaintiff may need to adduce facts showing that the defendant obtained the account holder's property for an improper use or that it knew about the illegal scams and knowingly aided and abetted them. [Das v. Bank of America, N.A.](#), 186 Cal. App. 4th 727, 112 Cal. Rptr. 3d 439 (2d Dist. 2010), review denied, (Oct. 13, 2010).

#### Illustration:

Assuming arguendo that financial abuse of elder statute provided account holder's daughter with private cause of action against bank, allegations that account holder obtained "suspicious \$105,000 mortgage loan and that bank followed account holder's instructions with respect to suspicious transactions involving illegal lottery scam" did not state claim for financial abuse by bank. [Das v. Bank of America, N.A.](#), 186 Cal. App. 4th 727, 112 Cal. Rptr. 3d 439 (2d Dist. 2010), review denied, (Oct. 13, 2010).

### § 11. Acting knowingly—Constructive knowledge

As an alternative to actual knowledge, the defendant's constructive knowledge of the wrongful nature of the conduct may be sufficient under some statutes. For example, under the financial abuse provision of California's **elder abuse** statute, constructive knowledge suffices to show that the defendant took or retained property for a wrongful use. Under the provision, a person or entity "is deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult." [Cal. Welf. & Inst. Code § 15610.30\(b\)](#). California's constructive knowledge provision was added through a 2008 amendment to the statute. A court has ruled that it did not apply retroactively to a bank's alleged failure to report suspicious financial transactions for an elderly and mentally incapacitated account holder that occurred prior to the amendment. The court reasoned that the change was substantive in nature rather than procedural, and the legislature did not state that the amendment was to have retroactive effect. [Das v. Bank of America, N.A.](#), 186 Cal. App. 4th 727, 112 Cal. Rptr. 3d 439 (2d Dist. 2010), review denied, (Oct. 13, 2010).

## § 12. Exploitation the elderly person's real property

Many financial **elder abuse** claims derive from the exploitation of an elderly person's real estate, often in the form of fraudulent financing schemes or transfers of title. A mortgage broker's solicitation of a refinance agreement from an elderly mortgagor without disclosing actual the terms of the loan, and by instructing the mortgagor to sign loan documents without actually reading them, constitutes financial **elder abuse**. [Zimmer v. Nawabi](#), 566 F. Supp. 2d 1025 (E.D. Cal. 2008) (applying Cal. Welf. & Inst. Code § 15610.30(a)(1) in ruling that a broker's fees were wrongfully obtained as a result of false statements about the terms of the refinance, which it knew were less favorable to the mortgagor than a previous mortgage). One particular form of financial **elder abuse** involving real estate is the targeting of elderly homeowners for inappropriate loans, such as those with misleading or excessive interest rates or repayment terms. [Cruickshank v. Wells Fargo Bank, N.A.](#), 2011 WL 2066670 (S.D. Cal. 2011). For a discussion of these issues generally, see [Cause of Action in Tort for Wrongful Foreclosure of Residential Mortgage](#), 52 Causes of Action 2d 119; [Cause of Action for Reverse Redlining or Predatory Home Mortgage Lending Under Fair Housing Act](#) [42 U.S.C.A. § 3605], 49 Causes of Action 2d 209.

### Illustrations:

A plaintiff sufficiently stated a claim for financial **elder abuse** against a successor bank of another bank that intentionally targeted elderly borrowers, such as the plaintiff, to place them in “toxic” loans, in order to generate substantial profits. The complaint further alleged that the predecessor bank trained, directed, and authorized its employees, agents, mortgage brokers, and loan officers to implement the type of scheme used on the plaintiff. Finally, the plaintiff contended that all defendants ratified each other's conduct. [Cruickshank v. Wells Fargo Bank, N.A.](#), 2011 WL 2066670 (S.D. Cal. 2011).

Borrowers, who were 78 and 77 years of age, stated an **elder abuse** claim under California's financial **elder abuse** statute against lenders, who allegedly acted as their “financial advisers” when they fraudulently (and negligently) induced them to obtain two loans from the lenders and, as a result, wrongfully induced them to mortgage their property, and incur interest charges, fees, and other expenses associated with the loans and development of the property. Accordingly, the court declined to dismiss the plaintiffs' cause of action for financial **elder abuse**. [Errico v. Pacific Capital Bank, N.A.](#), 753 F. Supp. 2d 1034 (N.D. Cal. 2010).

The defendant in a predatory real estate loan case failed to provide any authority for the proposition that tender of the amount necessary to cure default is required when a sale or foreclosure has not yet occurred and that tender is required on a financial **elder abuse** claim. Moreover, to the extent tender would be required, the court explained that this requirement may be waived where, in equity, the circumstances merit an exemption. [Reed v. Wells Fargo Bank](#), 2012 WL 2061623 (N.D. Cal. 2012) (the plaintiffs alleged facts that would support waiving the tender requirement, if any existed). Attempts to coerce payment by threatening to foreclose a security interest in real property may constitute a “taking” of property even if a transfer of title does not ultimately take place. [Diaz v. Bank of America Home Loan Servicing](#), 2010 WL 5313417 (C.D. Cal. 2010). Courts have implicitly recognized the fact that the taking of property from the elderly victim must be wrongful to constitute financial **elder abuse**. For example, foreclosing on a home does not constitute financial **elder abuse** merely because the procedure ultimately requires the former owner to move out of the residence. [Stebly v. Litton Loan Servicing, LLP](#), 202 Cal. App. 4th 522, 134 Cal. Rptr. 3d 604 (3d Dist. 2011), review denied, (Mar. 14, 2012) and unpublished/noncitable and unpublished/noncitable (unpublished opinion). The financial **elder abuse** may occur at the hands of a real estate developer. For example, in a California case, residents who were over 65 stated a claim for financial **elder abuse**, in alleging that developers made a lot-line adjustment that reduced the size of the residents' parcel and encumbered their property without a valid power of attorney, and that the developers never paid the residents for any portion of the parcel. [Bonfigli v. Strachan](#), 192 Cal. App. 4th 1302, 122 Cal. Rptr. 3d 447 (1st Dist. 2011), as modified on denial of reh'g, (Mar. 24, 2011).

Financial **elder abuse** in the real property context may be grounded in a conservator or caregiver's exploitive use of the elderly plaintiff's property. Thus, a guardian ad litem's allegations that a former conservator allowed a caregiver to live rent free in one



of elderly adult's apartments, allowed two of his friends to rent elderly adult's apartments at below-market rents, acquiesced in improper billing from a care giving agency, overcharged the elderly adult's estate for conservator services that were never performed or were unnecessary, and conspired to provide unnecessary care-giving services stated a cause of action for elder financial abuse. [Knox v. Dean](#), 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 (4th Dist. 2012).

Counsel for the plaintiff should be aware of the dangers of failing to plead in a manner that adequately tracks the language of the **elder abuse** statute. For example, in a case in which a lender representative disguised a subprime mortgage as a reverse mortgage, allegedly resulting in loan terms that were less advantageous to the plaintiff than the mortgage she had prior to the refinance, the plaintiff did not allege that the lender took, secreted, appropriated, obtained or retained any real or personal property from the plaintiff, as required by the financial **elder abuse** statute, but merely alleged that she was deprived of her “right to live in her home without mortgage payments for the rest of her life” and her “right to receive the cash value of her home equity of \$48,278.” These alleged rights were not real or personal property rights that give rise to a financial **elder abuse** claim, the court reasoned. Accordingly, the defendant's motion to dismiss was granted. [Lotenero v. Everett Financial Inc.](#), 2011 WL 2462775 (E.D. Cal. 2011).

### Practice Guide:

When a court is contemplating dismissing a claim for financial **elder abuse**, counsel for the plaintiff may try to have the dismissal issued without prejudice to seeking leave to amend. See [Lotenero v. Everett Financial Inc.](#), 2011 WL 2462775 (E.D. Cal. 2011); [Tuck v. Wells Fargo Home Mortg.](#), 2012 WL 2906738 (N.D. Cal. 2012) (voluntary dismissal). The same applies to dismissals on nonsubstantive grounds, such as for failing to allege the financial **elder abuse** with sufficient particularity. [McKie v. v. Sears Protection Co.](#), 2011 WL 1587112 (D. Or. 2011), report and recommendation adopted, 2011 WL 1587103 (D. Or. 2011) (the **elder abuse** claim was tantamount to a fraud claim under Oregon law, and therefore required pleading with particularity).

## B. Defenses

### § 13. Defenses, generally

Defenses available to the defendant on a financial **elder abuse** cause of action include those that rebut the prima facie case, such as the defense that the victim was not a qualifying “elderly” person or vulnerable adult under the governing statute, § 14, or that the defendant did not act wrongfully or with the requisite scienter within the meaning of the statute. § 15. In addition, the defendant may have an affirmative defense under the circumstances, such as a statutory exemption for transfers made to qualify for government aid, such as Medicaid, § 16; the victim's consent to the defendant's actions, § 17; an immunity or privilege under state law, § 18; preemption of the financial **elder abuse** statute by a federal law, such as a consumer protection scheme, § 19; or that the claim is subject to arbitration under the terms of an agreement of the parties, typically in the case of existing financial advisement or other business relationships, § 20.

### § 14. Victim was not a qualifying elderly person within statute

The **elder abuse** statutes often apply to all “vulnerable” adults, which in turn typically includes the elderly, either expressly or by operation of the definition under the particular case. Accordingly, the defendant may contend that the plaintiff was not “elderly” or “vulnerable” within the meaning of the financial **elder abuse** statute. Thus, in a Florida case where a purchaser alleged a cause of action for **elder abuse** after she signed an agreement with a vendor to terminate an agreement to purchase a rental unit on property that was being converted to condominiums, the purchaser did not set forth sufficient facts to come within the “vulnerable adult” requirement. [Woodruff v. TRG-Harbour House, Ltd.](#), 967 So. 2d 248 (Fla. 3d DCA 2007). Under the governing statute, the exploited person must be “a person 18 years of age or older whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, long-term physical, or developmental disability or dysfunctioning, or brain damage, or the infirmities of aging.” [Fla. Stat. Ann. § 415.102](#).

### **§ 15. Defendant did not act wrongfully and with requisite scienter**

One basic defense to a financial **elder abuse** claim is to rebut the prima facie element that the defendant acting wrongfully and knowingly. This may be demonstrated either by showing that the defendant's actions were not wrongful, as discussed in §§ 7 to 9, or that the defendant did not engage in them knowingly, that is, with actual or constructive knowledge, as discussed in §§ 10, 11.

For example, a federal district court found no wrongful taking under the California **elder abuse** statute in connection with a reverse mortgage deal entered into by an elderly homeowner. According to the plaintiff, the defendant took property for a wrongful use and knew or should have known that its conduct was likely to be harmful to the plaintiff, a protected elderly person under the California statute. Specifically, the plaintiff claimed to have been falsely led to believe that a reverse mortgage loan would protect both spouses against being displaced from their home during their lifetimes. The court, however, was not persuaded that the plaintiff has pleaded or offered facts to support a finding that the defendant wrongfully took property from the plaintiff. The plaintiff was not the record-title owner at the time of the subject loan, as he had quit-claimed the property to his wife, and all prior mortgages identified her as the sole borrower. Second, the defendant had properly commenced foreclosure proceedings because, under the terms of the reverse mortgage, the loan became due and payable upon the wife's death. The plaintiff had not alleged that the loan was not in default or that the foreclosure proceedings were improper. Because the plaintiff offered no evidence that the defendant either exercised undue influence or was wrongfully taking real property belonging to the plaintiff, the defendant was granted summary judgment in its favor on the financial **elder abuse** claim. The plaintiff was, however, able to avoid summary adjudication on a separate claim seeking reformation of the contract to include him as an intended party to the contract. [Kerrigan v. Bank of American, 2011 WL 3565121 \(C.D. Cal. 2011\)](#).

### **§ 16. Statutory exemption for Medicaid transfers and the like**

Under some state statutes, a transfer under Medicaid or other governmental programs may be expressly exempted from constituting a wrongful taking. For example, in Oregon, a transfer of money or other property that is made for the purpose of qualifying a vulnerable person for Medicaid benefits, or for any other state or federal assistance program, or the holding and exercise of control over money or property after such a transfer may be statutorily excepted from constituting a wrongful taking or appropriation, or the holding of money or property without good cause. [Or. Rev. Stat. § 124.110](#). Of course, the transfer that is subject to the exemption may not qualify in any event as a prima facie wrongful transfer (in light of the facts and circumstances of the case, such as the defendant's motives), and the affirmative defense created by the exemption may provide an extra potential layer of defensive cover.

### **§ 17. Victim consented to defendant's actions**

In some jurisdictions, financial exploitation of an elderly person is deemed not to have occurred if the purported victim knowingly consented, unless the consent was a consequence of misrepresentation, undue influence, coercion, or threat of force. [Mass. Gen. Laws Ann. ch. 19A, § 14](#).

#### **Illustration:**

In a Massachusetts case, elderly plaintiffs who purchased a mobile home sued the seller for breach of contract, fraud, and violation of the elder protection statute, among other claims. Although the plaintiffs did not deny that they signed the contract, they contended that any purported consent was a consequence of the defendants' misrepresentations. The court determined that because the claim was grounded on fraud and misrepresentation claims, it was necessary for the trier of fact to determine the intentions of the defendants when they entered into the purchase and sales agreement with the plaintiffs. Granting summary

judgment on the financial **elder abuse** cause of action was thus improper, as there was no evidence in the record concerning the defendants' intentions. [Wong v. Nieboer, 2006 Mass. App. Div. 67, 2006 WL 1172191 \(2006\)](#) (claim brought under [Mass. Gen. Laws Ann. ch. 19A, §§ 1 et seq.](#)

### § 18. Defendant has an immunity or privilege under state law

A qualified privilege against liability for financial **elder abuse** may be available to persons who are merely acting in accordance with statutory procedures or requirements. Thus, under California law, the beneficiary of a deed of trust—which is the California-equivalent of a mortgage—is entitled to the protection of a qualified privilege from liability under the **elder abuse** act in connection with its nonmalicious attempt to take real property from a protected individual through a nonjudicial foreclosure process. [Consumer Solutions REO, LLC v. Hillery, 658 F. Supp. 2d 1002 \(N.D. Cal. 2009\)](#). The court noted that the stronger “absolute” privilege that applies to judicial and quasi-judicial proceedings was inapplicable because nonjudicial foreclosure is a private procedure involving private parties. Defendants in states, such as New York, that use judicial foreclosure proceedings may therefore enjoy greater protection. [Consumer Solutions REO, LLC v. Hillery, 658 F. Supp. 2d 1002 \(N.D. Cal. 2009\)](#).

Under some state laws, persons in certain positions are required to report **elder abuse**, including financial exploitation, that they observe or know about. The law may apply specifically to financial institutions, for example. [Haw. Rev. Stat. § 412:3-114.5](#).

#### Illustration:

In Hawaii, a financial institution must report to the department of human services suspected financial abuse that is directed towards, targets, or is committed against an elder. The requirement applies in connection with providing financial services to the elderly person, where the officer or employee has direct contact with the elder or reviews or approves the elder's financial documents, records, or transactions. A report must be made if the officer or employee, within the scope of employment or professional practice: (A) observes or has knowledge of an incident the officer or employee believes in good faith appears to be financial abuse; or (B) in the case of officers or employers who do not have direct contact with the elder, has a good-faith suspicion that financial abuse has occurred or may be occurring, based solely on the information present at the time of reviewing or approving the document, record, or transaction. Suspected financial abuse must be reported immediately to the department by telephone and by written report sent within five business days. [Haw. Rev. Stat. § 412:3-114.5](#).

In cases of aiding and abetting, counsel for the defendant may want to check the state's statutory scheme for immunity provisions that protect such persons who make reports, even though, not surprisingly, these immunity provisions typically expressly exclude the abuser from the umbrella of immunity. See, e.g., [Del. Code Ann. tit. 16, § 1135\(c\)](#). In Delaware, any person making any oral or written report pursuant to the financial **elder abuse** statute that governs caregivers is immune from liability in any civil or criminal action by reason of the report, so long as it was made in good faith or under the reasonable belief that the financial exploitation took place. [Del. Code Ann. tit. 16, § 1135\(a\)](#). In Hawaii, any person, including a financial institution, who: (1) participates in the making of a report, and (2) believes in good faith that the action is warranted by facts known to that person is granted immunity from any liability that might be otherwise incurred or imposed with respect to participation in any judicial proceeding that results from the report. The immunity applies despite any other state law to the contrary, including but not limited to laws concerning confidentiality. [Haw. Rev. Stat. § 412:3-114.5\(d\)](#).

### § 19. Preemption by federal law

A plaintiff's cause of action for financial **elder abuse** may be preempted by federal law, such as a federal statute or regulation that regulates consumer transactions. For example, a borrowers' **elder abuse** and negligence claims against a lender were preempted by the federal Home Owner Lender Act, which addresses consumer-credit cost disclosures. [15 U.S.C.A. § 1641](#). The borrowers' claims turned on the alleged fact that the lender's agents convinced the borrowers to enter “complicated, risky and oppressive” loans. Congress's intent to preempt the state law claims could be inferred because the alleged conduct touched

upon to lending practices, operations, and charges, the court explained. Although California's **Elder Abuse** and Dependent Civil Protection Act does not appear on its face to pertain to the lending practices of federal savings associations, when the law was analyzed in relation to the particular circumstances of the case, it became much more apparent to the court that to apply the law imposed requirements on the defendant-bank that were already imposed on it by federal law. [Cosio v. Simental](#), 2009 WL 201827 (C.D. Cal. 2009).

However, preemption of an elder financial abuse will not always occur merely because a federal law is implicated, notably if the factual allegations are grounded in ordinary fraud or misrepresentation, rather than the misconduct affecting particular details that are regulated under federal law, such as real estate financing. For example, in one case, the plaintiffs' claims were not clearly preempted by the Home Owners' Loan Act of 1933 (HOLA). [12 U.S.C.A. §§ 1461 et seq.](#) The complaint alleged that a bank induced the plaintiffs to enter into a loan modification against their best interests and forced them to make higher loan payments by using the threat of foreclosure. The court reasoned that allegations did not necessarily challenge improprieties in the foreclosure process or otherwise challenge loan disclosures, interest rates or other factors that directly affect lending, but may arise from a more general duty not to misrepresent material facts. [Tuck v. Wells Fargo Home Mortg.](#), 2012 WL 2906738 (N.D. Cal. 2012).

### § 20. Claim is subject to arbitration

The defendant in a financial **elder abuse** case may bring a motion to compel arbitration. However, a trial court may not order the defendant into arbitration unless the parties contractually agreed to settle their disputes in that forum. [Verducci v. Coda](#), 743 F. Supp. 2d 1182 (S.D. Cal. 2010). This principle has been applied in the case of the heirs of an elderly couple suing a financial planner and financial-planning company. [Verducci v. Coda](#), 743 F. Supp. 2d 1182 (S.D. Cal. 2010).

#### Practice Guide:

Standing to seek arbitration may become crucial in a financial **elder abuse** case that has multiple defendants. Counsel for a defendant may need to examine whether its own client has entered into an arbitration agreement, as an arbitration agreement obtained by another defendant will likely be of no help. For example, in *Verducci*, the financial planning company had no standing—under an existing arbitration agreement between the client and investment firm—to compel arbitration under the Federal Arbitration Act, [9 U.S.C.A. § 2](#), of the heirs' claims, since the company was not a party to the agreement, and, indeed, was not even tangentially connected to it.

## C. Parties

### § 21. Persons who may bring action—Generally

An action seeking damages for financial **elder abuse** typically may be brought by the elderly victim, or where necessary, by family members, or by a guardian or other legal fiduciary. [Goldsmith v. State, Dept. of Social & Health Services](#), 280 P.3d 1173 (Wash. Ct. App. Div. 2 2012). Thus, the action may be brought by a conservator or “next friend.” [Tenn. Code Ann. § 71-6-120\(b\)](#). Under some statutes, if an action is not filed by the vulnerable adult or the duly appointed conservator or personal representative of the vulnerable adult's estate, then any other interested person may petition the court for leave to file an action on behalf of the vulnerable adult or the vulnerable adult's estate. [Ariz. Rev. Stat. Ann. § 46-456\(G\)](#). In some jurisdictions, an action by the state—rather than a private suit for damages by the victim—may be brought to remedy financial **elder abuse** specifically by caregivers, and a civil penalty may be assessed against the perpetrator. [Haw. Rev. Stat. § 28-94](#).

#### Illustration:

In Hawaii, a law authorizes the state attorney general to bring a civil action on behalf of the state against any caregiver who commits abuse of a dependent elder, to prevent, restrain, or remedy the conduct. Any caregiver against whom a civil judgment is entered is subject to a civil penalty of not less than \$500 nor more than \$1,000 for each day that the abuse occurred, and the costs of investigation. Abuse is expressly defined under the statute to include financial and economic exploitation, which is further explicated as the wrongful or negligent taking, withholding, misappropriation, or use of a dependent elder's money, real property, or personal property. The law sets forth a nonexclusive list of illustrative examples, including (1) breaches of fiduciary relationships such as the misuse of a power of attorney or the abuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property; (2) the unauthorized taking of personal assets; (3) the misappropriation, misuse, or unauthorized transfer of moneys belonging to the dependent elder from a personal or joint account; or (4) the intentional or negligent failure to effectively use a dependent elder's income and assets for the necessities required for the elder's support and maintenance. The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of undue influence. [Haw. Rev. Stat. § 28-94](#).

Recognizing that many financial **elder abuse** claims will not be filed until after the death of the **elder abuse** victim, legislatures have intended to allow claims for financial **elder abuse** to proceed unimpeded by either the death of the **elder abuse** victim or limitations imposed by other laws, such as probate codes. [In re Estate of Winn, 214 Ariz. 149, 150 P.3d 236 \(2007\)](#). A financial exploitation claim under a state's **elder abuse** act thus survives the death of an incapacitated person. [In re Estate of Wytenbach, 219 Ariz. 120, 193 P.3d 814 \(Ct. App. Div. 1 2008\)](#) (applying the Adult Protective Services Act, [Ariz. Rev. Stat. Ann. § 46-456\(P\)](#)). This freedom from restrictions furthers the goal of protecting the elderly from abuse, neglect, and exploitation. [In re Estate of Winn, 214 Ariz. 149, 150 P.3d 236 \(2007\)](#). In Tennessee, the right of action is not abated or extinguished by the death of the elderly person, but passes as provided by statute, unless the alleged wrongdoer is a family member, in which case the cause of action passes to the victim's personal representative. [Tenn. Code Ann. § 71-6-120\(b\)](#).

#### Illustration:

A typical scheme prevails in Washington State, where an action for damages may be brought by the vulnerable adult, or where necessary, by his or her family members, or guardian or legal fiduciary, and the death of the vulnerable adult does not deprive the court of jurisdiction over the claim. Upon a petition, after the death of the vulnerable adult, the right to initiate or maintain the action is transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in the statute. If there are no beneficiaries, then the action is for recovery of all economic losses sustained by the deceased person's estate. [Wash. Rev. Code Ann. § 74.34.210](#).

Complications may arise if the successor in interest, such as a spouse, is actually a perpetrator of the financial abuse and thereby statutorily barred from standing to sue. Counsel may need to examine the respective statutory standing of other family members, such as children or grandchildren of the victim. Whether the family members have a sufficient “interest” in the litigation may turn on the effect that a recovery on the cause of action will have on the family members as beneficiaries under the victim's will or trust, or under the state's intestacy rules. [Lickter v. Lickter, 189 Cal. App. 4th 712, 118 Cal. Rptr. 3d 123 \(3d Dist. 2010\)](#), review denied, (Jan. 26, 2011).

#### Illustration:

In a case from California, grandchildren who were beneficiaries of a trust of the deceased grandmother were not “interested persons” with regard to any **elder abuse** cause of action belonging to the grandmother, within the meaning of a statute providing that if the personal representative of decedent or family of representative were alleged to have committed abuse, then the right to commence or maintain an **elder abuse** action would pass to an interested person, including, for example, an heir, beneficiary, or devisee. Accordingly, the grandchildren lacked standing to bring an **elder abuse** action against their father, who was the personal representative of the grandmother through his capacity as trustee of the grandmother's trust, their half-sisters, and their half-sisters' mother. The court reasoned that the grandchildren's vested beneficiary interest in the trust was not affected by the

action since there were sufficient trust assets to make payments to the grandchildren regardless of whether any recovery was to be had in the **elder abuse** action, and the grandchildren no longer retained a beneficiary interest once the payments were rendered by the father following commencement of the action. Although the grandchildren had no standing, their father did, as he was the residuary beneficiary of the deceased grandmother's trust and her personal representative through his capacity as trustee of the trust. [Lickter v. Lickter](#), 189 Cal. App. 4th 712, 118 Cal. Rptr. 3d 123 (3d Dist. 2010), review denied, (Jan. 26, 2011).

#### **Practice Guide:**

Counsel should check to see whether the statute at issue required the plaintiff to be a resident of the state in which the claim is brought. [Makaeff v. Trump University, LLC](#), 2010 WL 3988684 (S.D. Cal. 2010) (dismissing claim partly on ground that plaintiff was not alleged to be a resident of California).

### **§ 22. Persons who may bring action—Class actions**

A court may grant class-action certification on a financial **elder abuse** cause of action in certain cases. For example, in a California case, a federal court certified a class of all California residents who were at least 65 years of age at the time of purchasing a type of annuity from a certain life insurance company. The class included persons who purchased from a certain date to the present. The court also certified a nationwide class to pursue a federal RICO claim. [Kennedy v. Jackson Nat. Life Ins. Co.](#), 2010 WL 2524360 (N.D. Cal. 2010).

#### **Illustration:**

In *Kennedy*, the plaintiff had asserted that there would be a large number of people in the nationwide class (pursuing a RICO claim) and a smaller but substantial number in the California class, which included the **elder abuse** claim. Since the defendant did not contest the plaintiff's figures, the court accordingly found that the plaintiff satisfied the "numerosity" requirement under the federal rules. Addressing the "commonality" requirement for class certification, the court concluded that there were questions of law or fact common to the class concerning the defendant's alleged material misrepresentations and omissions in marketing to senior citizens, and that those questions predominated over individual ones. In finding that the "typicality" requirement was satisfied here, the court noted that the named plaintiff, at the age of 65, purchased one of the defendant's annuities after attending a presentation by and receiving materials from one of the defendant's representatives. The defendant did not challenge the plaintiff's argument that her interests align with those of individuals in the classes for which she sought certification, nor did the defendant raise unique issues pertaining to the plaintiff. Finally, addressing the "adequacy" requirement, which ensures that absent class members are afforded competent representation before entry of a judgment that binds them, the court rejected the defendant's contention that the plaintiff—by not pursuing certification on the multiple theories of liability asserted in her complaint—had engaged in "claim splitting" and was therefore inadequate to represent the class. The court explained that after the plaintiff had conducted discovery on its claims, she apparently concluded that the theories she had winnowed the case down to afforded the greatest likelihood of success on behalf of the class. Moreover, the court noted, a claim based on the suitability of the defendant's annuities could require an individualized inquiry into each class member's circumstances, and the defendant could not claim that the plaintiff was inadequate because she declined to assert a theory that could unravel the putative class. [Kennedy v. Jackson Nat. Life Ins. Co.](#), 2010 WL 2524360 (N.D. Cal. 2010) (applying *Fed. R. Civ. P. 23(a) and (b)(3)*).

#### **Practice Guide:**

Defendants may need to ensure that they do not seek relief from class certification too early. Thus, a motion to dismiss the claim may be premature. For example, when the defendants in a suit in the Ninth Circuit contended that nationwide state-law



allegations pertaining to financial **elder abuse** should be dismissed to the extent they sought relief for non-California residents, the court disagreed, concluding that the issue was better decided on a motion for class certification. The court thus denied the defendants' motion to dismiss the **elder abuse** claims to the extent that they sought relief for non-California residents. [Migliaccio v. Midland Nat. Life Ins. Co.](#), 2007 WL 316873 (C.D. Cal. 2007).

### § 23. Persons potentially liable

Financial **elder abuse** may be either domestic, i.e., by relatives or caregivers, or institutional, such as by a nursing home or its employees. See Hon. Georgia Akers, [Elder Abuse and Exploitation: The Ethical Duty of the Attorney](#), 47-AUG Hous. Law. 10 (2009). **Elder abuse**, including financial exploitation of mentally compromised person, is often hidden from view. [Mabel R. v. Rayshawn D.](#), 33 Misc. 3d 1023, 933 N.Y.S.2d 529 (Fam. Ct. 2011); [Boyce v. Fernandes](#), 77 F.3d 946 (7th Cir.1996). When the misconduct is committed by a member of the victim's family—a common occurrence—the secretive actions may be particularly difficult to ferret out. [Campbell v. Thomas](#), 73 A.D.3d 103, 897 N.Y.S.2d 460 (2d Dep't 2010).

In addition to the direct perpetrator of the harm, a person who aids and abets financial **elder abuse** may be liable under some statutes. For example, in Oregon, an action may be brought against a person for permitting another person to engage in physical or financial abuse if the person knowingly acts or fails to act under circumstances in which a reasonable person should have known of the physical or financial abuse. [Or. Rev. Stat. § 124.100\(5\)](#). Financial abuse of an elder can be stated not only against the person who takes the property, but also against a person who secretes, appropriates, or retains the property in bad faith. [Teselle v. McLoughlin](#), 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696 (3d Dist. 2009).

## III. Practice and Procedure

### A. General Procedural Matters

#### § 24. Subject matter jurisdiction

**Elder abuse** causes of actions are ordinarily state-law claims that are brought in state court. [Fla. Stat. Ann. § 415.1111](#) (the action may be brought in any court of competent jurisdiction). The statute may provide that jurisdiction is in the circuit or chancery court where the elderly person or disabled adult resides or where the actions occurred. [Tenn. Code Ann. § 71-6-120\(c\)](#).

Federal-question jurisdiction in the federal district court will typically be unavailing to the plaintiff on the financial **elder abuse** cause of action itself. In an Oregon federal case, for example, the plaintiffs sought to establish liability for financial abuse of an elderly person and intentional infliction of emotional distress, as well as liability for fraud and deceit with respect to securities. However, the plaintiffs failed to suggest any federal statute or constitutional provision under which their claims of financial **elder abuse** or intentional infliction of emotional distress might have arisen, either in their complaint or in their response to an order to show cause, and the court could not identify any. Neither claim necessarily implicated any federal question, and although the complaint referred to the federal Americans with Disabilities Act, the ADA does not provide any cause of action for financial **elder abuse**, the court explained. [Langley v. Jones](#), 2012 WL 774993 (D. Or. 2012), report and recommendation adopted, 2012 WL 774962 (D. Or. 2012).

However, an **elder-abuse** plaintiff may establish federal court jurisdiction through claims arising under federal statutes, typically those relating to real property transactions, such as the Truth in Lending Act and the Home Ownership Equity Protection Act (HOEPA). The plaintiff's state-law financial **elder abuse** cause of action may then be heard as a related claim under the federal court's supplemental jurisdiction. [28 U.S.C.A. § 1367](#). See [§ 45](#). If the plaintiff suffers dismissal, however, because the court declines to exercise supplemental jurisdiction over the cause of action, the court may make the dismissal without prejudice to refile in state court. [Reagen v. Aurora Loan Services, Inc.](#), 2009 WL 3789997 (E.D. Cal. 2009).

Even if the court has subject-matter jurisdiction over the **elder abuse** claim, a party may seek a transfer to another court having concurrent jurisdiction. Thus, the defendant may file a notice to remove the case to the federal district court under [28 U.S.C.A. § 1331](#). The **elder abuse** claim will then be heard along with the plaintiff's federal claims in federal district court. Another type of transfer is between state courts. Proper procedures must be followed, however. For example, a trial court did not deny an elderly adult his constitutional due process rights by failing to transfer his **elder abuse** case to probate court, as the adult's guardian ad litem never requested that the case be transferred to the probate court, and the trial court did not have a duty to transfer it sua sponte. [Knox v. Dean, 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 \(4th Dist. 2012\)](#).

### § 25. Personal jurisdiction

As in other litigation, the court must have personal jurisdiction over the defendant in a financial **elder abuse** case. In a case involving facts constituting financial abuse of an elderly person, alleging undue influence, conspiracy, and fraud in regard to certain of patient's monetary and property transfers—but not asserting a separate claim for financial **elder abuse** per se—a Maine trial court's exercise of jurisdiction over caregivers under the state's long-arm statute comported with due process requirements. In finding that Maine therefore had a legitimate interest in the subject of the litigation, the court observed that the action was brought by the patient's estate against the patient's former caregivers, who were German residents who could have reasonably anticipated litigation in Maine. The court found that that the caregivers purposefully directed their activities at Maine residents and institutions by telephoning the Maine-resident attorneys-in-fact for the patient, seeking to prevent them from contacting the patient, sending faxes to a Maine bank, and sending an agent to Maine to gain information about and access to the patient's money and property. The patient was a 40-year resident of Maine, had substantial assets remaining in Maine that were allegedly threatened by the caregivers' actions, the tortious conduct occurred in Maine and affected the patient or her property in Maine, the action involved a power of attorney properly executed in Maine, and significant witnesses and records were located in Maine. [Estate of Hoch v. Stifel, 2011 ME 24, 16 A.3d 137 \(Me. 2011\)](#) (applying [Me. Rev. Stat. Ann. tit. 14, § 704-A](#)).

### § 26. Time for bringing action and limitations

A state may have a specific statute governing the limitations period for filing a financial **elder abuse** cause of action. In California, for example, a claim for financial abuse of an elder or dependent adult must be commenced within four years after the plaintiff discovers—or through the exercise of reasonable diligence should have discovered—the facts constituting the financial abuse. [Cal. Welf. & Inst. Code § 15657.7](#). If the facts are not well developed, the court may be willing to give the benefit of the doubt to the plaintiff on the issue of when the plaintiff knew, or should have been known, of the facts giving rise to the claim.

#### Illustration:

In a federal case from California, although the plaintiffs alleged that a refinance transaction occurred in December 2005, they did not file their financial **elder abuse** action until October 4, 2010. The plaintiffs asserted that they did not discover the facts underlying their claim until 2009, when they suffered financial problems as a result of increased mortgage payments. This bald allegation was insufficient given the disclosures on the documents signed by the plaintiffs, however. At a hearing, the plaintiff's counsel represented that they could allege additional facts demonstrating delayed discovery of the facts giving rise to their claim. Although the court had reservations under the current record over whether the plaintiffs would be able to cure the pleading defect, the court granted them one more opportunity to attempt to allege a viable claim in light of the seriousness of the claims and the impact that dismissal with prejudice would have on them. [Giordano v. Wachovia Mortg., FSB, 2011 WL 3360004 \(N.D. Cal. 2011\)](#).

In a case alleging causes of action for financial **elder abuse**, as well as breach of fiduciary duty, fraud, negligence, negligent misrepresentation, intentional infliction of emotion distress, and violation of the California Business and Professions Code, the court applied the principles that under California law, the statute of limitations accrues upon the occurrence of the last element essential to the cause of action. [California Sansome Co. v. U.S. Gypsum, 55 F.3d 1402 \(9th Cir. 1995\)](#). Furthermore, a tort



claim does not accrue until there is wrongdoing and actual and appreciable harm. [California Sansome Co. v. U.S. Gypsum](#), 55 F.3d 1402 (9th Cir. 1995). The defendant, therefore, bears the burden of demonstrating that the asserted wrongdoing and harm occurred outside the limitations period. [Cruickshank v. Wells Fargo Bank, N.A.](#), 2011 WL 2066670 (S.D. Cal. 2011).

### § 27. Pleading, generally

The plaintiff will fail to state a claim for financial **elder abuse** in violation of a state **elder abuse** statute unless the misconduct specifically alleges what the particular defendant did, when it was done, and—where fraud is required—how the misconduct was fraudulent. [Quintero Family Trust v. OneWest Bank, F.S.B.](#), 2010 WL 392312 (S.D. Cal. 2010) (against mortgagee and mortgage loan assignee). Bald allegations of financial **elder abuse** will not suffice. [Impink v. Bank of America, N.A.](#), 2012 WL 3025144 (S.D. Cal. 2012). Mortgagors who plead only general facts within their state-law fraud claim against a mortgagee, relating to refinancing of a home loan, will fail to satisfy the particularity requirement for pleading fraud claims. A financial **elder abuse** claim may be dismissed if the complaint fails to mention the defendant by name at all. [Harrison v. Downey Savings and Loan Ass'n, F.A.](#), 2009 WL 2524526 (S.D. Cal. 2009). The plaintiffs cannot make merely general allegations of wrongdoing, and fail to specify which defendants violated which provisions of the statutes. Thus, vague and conclusory allegations are insufficient to state a claim upon which relief can be granted, as the facts supporting each alleged violation must be specified. [Gwin v. Pacific Coast Financial Services](#), 2010 WL 1691567 (S.D. Cal. 2010).

Heightened pleading requirements typically apply in the case of fraud claims, and financial **elder abuse** causes of actions often rely on fraudulent misconduct, notably in the case of real estate transactions. For example, on a claim in connection with the refinancing of a home loan and ensuing foreclosure proceedings, mortgagors failed to state a claim that the mortgagee committed **elder abuse** under California law, as the mortgagors failed to plead that they were “elders” and failed to specify what actions taken by the mortgagee constituted the financial abuse. [Taguinod v. World Sav. Bank, FSB](#), 755 F. Supp. 2d 1064 (C.D. Cal. 2010) (applying [Fed. Rules Civ. Proc., Rule 9\(b\)](#)).

### Practice Guide:

Counsel should examine whether the particular **elder abuse** statute currently has any procedural conditions precedent to suit, such as a requirement that the state name the alleged victim and perpetrator in a confirmed report before the victim can sue. Florida had precisely this requirement, but the statutory provision was later amended to eliminate the obstacle. [Migliaccio v. Midland Nat. Life Ins. Co.](#), 2007 WL 316873 (C.D. Cal. 2007).

### § 28. Trial

A statutory exception to the hearsay rule may be available to aid in the admission of out-of-court statements of an elderly persons who suffers from a mental impairment and was the victim of financial exploitation. [IL ST CH 735 § 5/8-2701](#).

### Illustration:

In Illinois, an out-of-court statement made by an eligible adult, as defined in the **Elder Abuse** and Neglect Act, who has been diagnosed by a physician to suffer from (i) any form of dementia, developmental disability, or other form of mental incapacity; or (ii) any physical infirmity which prevents the eligible adult's appearance in court, describing any act of **elder abuse**, neglect, or financial exploitation, or testimony by an eligible adult of an out-of-court statement made by the eligible adult that he or she complained of such acts to another, is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the eligible adult either testifies at the proceeding or is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement. Under this law, if a statement is admitted, the court must instruct the jury that it is their

role to determine the weight and credibility to be given to the statement and that, in making its determination, the jury must consider the condition of the eligible adult, the nature of the statement, the circumstances under which the statement was made, and any other relevant factors. The proponent of the statement shall give the adverse party reasonable notice of an intention to offer the statement and the particulars of the statement. [IL ST CH 735 § 5/8-2701](#).

Res judicata will not bar a claim that a widow committed financial **elder abuse** and was therefore restricted in her ability to receive a share of the estate. Thus, a finding on a testator's grandson's prior probate petition, that the testator's widow had a right to receive a share of the estate as an omitted spouse, was not res judicata precluding the grandson's later claim that the widow committed financial **elder abuse** and was therefore restricted in her ability to receive a share of the estate. The widow's primary right to receive a share of the estate was distinct from testator's primary right not to be abused, and thus even if the **elder abuse** issue had been raised in the prior proceeding, it would have been improper for the court to rely on **elder abuse** as the basis for denying the widow entitlement to a share of the estate. [In re Estate of Dito, 198 Cal. App. 4th 791, 130 Cal. Rptr. 3d 279 \(1st Dist. 2011\)](#), as modified, (Aug. 23, 2011). However, orders on a former conservator's first three accountings of an elderly adult's estate operated as res judicata for purposes of financial **elder abuse** claims by the adult's family member, despite her contention she had no legal duty to act on the adult's behalf and that he been declared incompetent. The family member had received actual notice of the hearings on the three accountings, and in fact filed objections to the third accounting. [Knox v. Dean, 205 Cal. App. 4th 417, 140 Cal. Rptr. 3d 569 \(4th Dist. 2012\)](#).

In California, any money judgment in a statutory action for **elder abuse** must include a statement that the damages are awarded on that specific statutory basis. If only part of the judgment is based on that claim, the judgment must specify what amount was awarded on that basis. [Cal. Welf. & Inst. Code § 15657.5\(e\)](#).

## B. Proof

### § 29. Generally

In establishing a prima facie case of financial **elder abuse**, the plaintiff may introduce evidence to show a wrongful or exploitive conduct, such as evidence to prove that a defendant-caretaker exploited its position of trust and confidence in obtaining property from the elderly victim. For example, evidence may be adduced that the caretaker was paid reasonable compensation for his or her services yet nonetheless accepted loans, gifts of money, and other property from the victim without advising the victim to seek the help of a family member or a lawyer. Another useful evidentiary fact would be that the transfers did not benefit the elderly victim. See, e.g., [Davis v. Zlatos, 211 Ariz. 519, 123 P.3d 1156 \(Ct. App. Div. 1 2005\)](#) (loans and “gifts” received by caretaker).

In a vendor's action against a real estate broker and the purchaser of the vendor's residence in a leaseback transaction for claims including financially dependent adult abuse, the court found highly probative the evidence relating to the vendor's godmother's lawsuit against the vendor and purchaser seeking to quiet title to the godmother's residence, including the complaint and the settlement agreement, as the vendor's prosecution of the action the against broker and purchaser was required by a promise the vendor made to the godmother's conservator in the settlement of the godmother's lawsuit. [Bell v. Mason, 194 Cal. App. 4th 1102, 125 Cal. Rptr. 3d 229 \(2d Dist. 2011\)](#), as modified, (May 5, 2011) and review denied, (July 27, 2011).

Other proof may address the proper amount of damages. For example, for purposes of a compensatory damages calculation in an action by the estate of a patient against former caregivers, alleging undue influence, conspiracy, and fraud in regard to a certain of the patient's monetary and property transfers, the evidence did not support a valuation on an elderly patient's brokerage account at 2,184,694.15 Euros, and the valuation should have been modified to 2,048,032.93 Euros. The evidence did not show on what date the transfers from the account had occurred, and the latter valuation represented an amount for which the evidence was not speculative and which the caregivers held in their own brokerage account following the transfer from the patient's brokerage account. [Estate of Hoch v. Stifel, 2011 ME 24, 16 A.3d 137 \(Me. 2011\)](#).

### § 30. Burden of proof

As with the usual civil claim, the standard of proof for a financial **elder abuse** claim is the preponderance of the evidence. [Cal. Welf. & Inst. Code § 15657.5\(a\)](#). Under some statutes, to obtain the enhanced remedies provided by a financial **elder abuse** law, the plaintiff must demonstrate by clear and convincing evidence that the defendant was more than just negligent. For example, to recover punitive damages, a demonstration of reckless, oppressive, fraudulent, or malicious conduct is required. [Nieves v. JP Morgan Bank, N.A., 2012 WL 2873630 \(N.D. Cal. 2012\)](#); [Sababin v. Superior Court, 144 Cal. App. 4th 81, 50 Cal. Rptr. 3d 266 \(2d Dist. 2006\)](#). As to treble damages on a financial **elder abuse** cause of action, see § 35.

## C. Remedies and Recovery

### § 31. Remedies, generally

In a suit for financial **elder abuse**, compensatory damages typically are expressly available under the statute to a prevailing plaintiff. See, e.g., [Del. Code Ann. tit. 6, § 2583\(a\)](#); [Cal. Welf. & Inst. Code § 15657.5\(a\)](#). Financial **elder abuse** laws often provide enhanced remedies, including reasonable attorney's fees and costs, and, in a wrongful death action involving abuse or neglect of an elderly or dependent adult, damages for pain and suffering. [Intieri v. Superior Court, 117 Cal. App. 4th 72, 12 Cal. Rptr. 3d 97 \(6th Dist. 2004\)](#).

#### Illustration:

Under Washington State's financial **elder abuse** provision, the prevailing plaintiff is entitled to actual damages and the costs of the suit, including a reasonable attorney's fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary in litigating the claim. [Wash. Rev. Code Ann. § 74.34.200\(3\)](#).

Other remedies typically available to a plaintiff on a financial **elder abuse** include prejudgment attachment, § 32; equitable relief, § 34; pain and suffering, § 33; enhanced damages, such as treble § 35 or punitive damages § 6; pain and suffering, § 33; and attorney's fees, § 37.

The remedy sought is not always damages. For example, a family member of the exploited victim may seek to have a spouse denied a share of the victim's probate estate. For example, in California, a statute provides that a person who is liable for **elder abuse** of a decedent is deemed to have predeceased the decedent. [Cal. Prob. Code § 259](#). The purpose of the statute is to deter the abuse of elders by prohibiting abusers from benefiting from the abuse. [In re Estate of Dito, 198 Cal. App. 4th 791, 130 Cal. Rptr. 3d 279 \(1st Dist. 2011\)](#), as modified, (Aug. 23, 2011). This provision does not necessarily eliminate the abuser's entitlement to a share of the estate, but merely restricts the value of the estate to which the abuser's percentage share is applied and prevents that person from benefiting from his or her own wrongful conduct. [In re Estate of Dito, 198 Cal. App. 4th 791, 130 Cal. Rptr. 3d 279 \(1st Dist. 2011\)](#), as modified, (Aug. 23, 2011).

#### Practice Guide:

Some states may authorize a civil penalty, payable to the state. Counsel may be well advised to research whether, as is the case in Delaware, the state provides that a restitution order issued in favor of the plaintiff in a financial **elder abuse** case has priority over the civil penalty. [Del. Code Ann. tit. 6, § 2583\(a\)](#).

### § 32. Prejudgment attachment

In a run-of-the-mill lawsuit, the writ of attachment is a remedy that ordinarily requires a showing of special circumstances, as specified in the governing civil-procedure provision. For example, in New York, prejudgment attachment is available (except in matrimonial actions) only in specified cases, such as where the defendant is a nonresident, is difficult to serve, or may be hiding assets. N.Y. Civ. Prac. Law and Rules 6201 (McKinney). In California, if the action is against a defendant who is a natural person, an attachment may be issued only on a claim arising out of the conduct by the defendant of a trade, business, or profession. See [Cal. Civ. Proc. Code § 483.010](#).

However, under a statutory cause of action for financial **elder abuse**, the governing statute may specifically liberalize the granting of the writ. For example, in California, despite the general restrictions on the issuance of attachments under [Cal. Civ. Proc. Code § 483.010](#), an attachment may be issued in any action for damages for financial abuse of an elder or dependent adult, in addition to other forms of relief that are sought. [Cal. Welf. & Inst. Code § 15657.01](#). Clearly, this easing of the requirements for securing an eventual judgment is particularly useful in a financial **elder abuse** case, in which valuable assets taken from the elderly victim may still be in the hands of the defendants.

### § 33. Pain and suffering

Courts have ruled that an **elder abuse** statute that expressly provides to victims of **elder abuse** and their representatives the right to recover damages for pain and suffering, even after the death of abused victim, is not limited by a survival statute that generally prevents recovery of pain and suffering damages after the death of the injured person. [Matter of Guardianship/Conservatorship of Denton](#), 190 Ariz. 152, 945 P.2d 1283 (1997) (physical abuse); [In re Estate of Wytenbach](#), 219 Ariz. 120, 193 P.3d 814 (Ct. App. Div. 1 2008) (financial exploitation). In California, if it is demonstrated by clear and convincing evidence that a financial **elder abuse** defendant acted with recklessness, oppression, fraud, or malice, the state's statutory bar on pain and suffering damages in actions brought by executors does not apply. [Cal. Welf. & Inst. Code § 15657.5\(b\)](#). As to who has standing to sue for financial **elder abuse**, generally, see §§ 31, 32.

#### Illustration:

A jury found causation under a preponderance of the evidence standard, and found by clear and convincing evidence that one of the defendant's employees had acted recklessly, but failed to find any “oppression, fraud, or malice” by clear and convincing evidence. [Perlin v. Fountain View Management, Inc.](#), 163 Cal. App. 4th 657, 77 Cal. Rptr. 3d 743 (2d Dist. 2008).

A claim that property of an elderly person was taken for “a wrongful use or with intent to defraud or both” does not require evidence that the plaintiff experienced mental suffering if emotional distress was not alleged and damages for pain and suffering was not sought. [Bonfigli v. Strachan](#), 192 Cal. App. 4th 1302, 122 Cal. Rptr. 3d 447 (1st Dist. 2011), as modified on denial of reh'g, (Mar. 24, 2011) (residents' claim for financial **elder abuse** based on a real estate developer's alleged taking of property).

### § 34. Equitable remedies

Under some statutes, equitable relief may be available in the form of the return of property that was wrongfully appropriated, or rescission or reformation of a contract. For example, in California, a person or entity that takes, secretes, appropriates, obtains, or retains the real or personal property of an elder or dependent adult when the elder or dependent adult lacks capacity pursuant to the Probate Code, or is of unsound mind, but not entirely without understanding, pursuant to section 39 of the Civil Code, must, upon demand by the elder or dependent adult or a representative, return the property. The statute applies also to those who assist in the misconduct. If the wrongdoer fails to return the property, the victim is entitled to statutory remedies, including attorney's fees and costs. The grant of equitable relief does not apply, however, to an agreement that was entered into by an elder or dependent adult when the person still had legal capacity. [Cal. Welf. & Inst. Code § 15657.6](#).

Some relief may be available outside the financial **elder abuse** statute itself. For example, rescission or reformation of a contract to transfer property may be an available remedy. Counsel may inquire whether their state has a scheme like the one that Maine has enacted—the Improvident Transfer of Title Act—which creates a presumption of undue influence under certain circumstances for transfers of real property, and certain other assets, made to persons in a confidential or fiduciary relationship with an elderly person. [Me. Rev. Stat. Ann. tit. 33, §§ 1021 to 1025](#). This presumption of undue influence may create a favorable posture for the plaintiff's attorney during pre-trial negotiations. See Culley & Sanders, [Exploitation and Abuse of the Elderly During the Great Recession: A Maine Practitioner's Perspective](#), 62 Me. L. Rev. 429 (2010).

#### **Illustration:**

Under Maine's scheme, a separate civil action may be brought to obtain this specialized equitable relief by an elderly dependent person, or by that person's legal representative or the personal representative of their estate. [Me. Rev. Stat. Ann. tit. 33, § 1023\(1\)](#). If a court finds that a transfer of property or execution of a guaranty was the result of undue influence, it must grant appropriate relief enabling the victim to avoid the transfer or execution. Relief includes rescission or reformation of a deed or other instrument, the imposition of a constructive trust on property, or an order enjoining use of or entry on property or commanding the return of property. The statute is very flexible. For example, another form of available remedy is that if the court finds that undue influence is a binding defense to a transferee's suit on a contract to transfer the property or a suit of a person who benefits from the execution of a guaranty on that guaranty, the court must refuse to enforce the transfer or guaranty. [Me. Rev. Stat. Ann. tit. 33, § 1023\(2\)](#). Good-faith transferees are protected from the effect of this relief, however. Thus, relief cannot be obtained or granted if it would affect or limit the right, title, and interest of good-faith purchasers, mortgagees, holders of security interests, or other third parties who obtain an interest in the transferred property for value after its transfer from the elderly dependent person. The relief also is impermissible if it would affect a mortgage deed to the extent of value given by the mortgagee. [Me. Rev. Stat. Ann. tit. 33, § 1023\(1\)](#). An “elderly person” means someone 60 years of age or older. [Me. Rev. Stat. tit. 33, § 1021\(2\)](#). The term “dependent,” with respect to an elderly person, means wholly or partially dependent upon one or more other persons for care or support, either emotional or physical, because the elderly person (1) suffers from a significant limitation in mobility, vision, hearing, emotional or mental functioning or the ability to read or write, or (2) is suffering or recovering from a major illness or is facing or recovering from major surgery. [Me. Rev. Stat. Ann. tit. 33, § 1021\(1\)](#).

### **§ 35. Treble damages**

Treble damages, and other multiple-damages remedies, may be available in the jurisdiction where the financial **elder abuse** claim is brought. Counsel will need to examine the statute closely, as there is a fair degree of variance among the laws. For example, in Oregon, the court must award to a successful financial **elder abuse** plaintiff an amount equal to three times all economic damages resulting from the abuse, or \$500, whichever is greater. In addition, the Oregon statute requires awarding an amount equal to three times all noneconomic damages resulting from the abuse. [Or. Rev. Stat. § 124.100\(2\)](#). In Arizona, the court is authorized to award the prevailing plaintiff on a financial **elder abuse** cause of action additional damages for an amount up to two times the amount of the actual damages.” [Ariz. Rev. Stat. Ann. § 46-456\(B\)](#). The enhanced damages provisions of some statutes are directed specifically at causes of action that involve certain types of financial **elder abuse**, such as consumer fraud. [Del. Code Ann. tit. 6, § 2583](#).

#### **Illustration:**

In Delaware, the Elder or Disabled Victims Enhanced Penalties Act (EDVEPA) grants a private right of action to elderly or disabled victims of consumer fraud. [Del. Code Ann. tit. 6, § 2583](#). The law addresses elderly or disabled persons who are targeted for deceptive, fraudulent, or unfair trade practices, and provides that an eligible victim is entitled to recover three times the amount of the victim's compensatory damages. [Erhart v. DirecTV, Inc., 2012 WL 2367426 \(Del. Super. Ct. 2012\)](#). This recovery is in addition to any other damages to which the victim is entitled pursuant to the common law or other provisions of the Delaware Code. [Del. Code Ann. tit. 6, § 2583\(b\)](#).

### § 36. Punitive damages

Under many financial **elder abuse** statutes, an award of punitive damages is authorized. For example, in Florida, a vulnerable adult (which statutorily includes the elderly) who has been abused, neglected, or exploited may recover actual and punitive damages. [Fla. Stat. Ann. § 415.1111](#). The egregious nature of the misconduct necessary to support punitive damages may be evident from the physical or emotional harm that was caused to the victim. [Estate of Hoch v. Stifel, 2011 ME 24, 16 A.3d 137 \(Me. 2011\)](#).

#### Illustration:

In a case that alleged common-law torts arising from financial abuse of an elderly patient, the court ruled that punitive damages of \$3 million awarded by a Maine court was not excessive. The patient's estate had sued her caregivers for undue influence, conspiracy, and fraud arising from their virtual imprisonment of the patient during her final few years of life, even though the events that supported the award of punitive damages occurred in Germany. The court explained that compensatory damages of almost \$3,750,000 were awarded, and Maine had an interest in deterring future egregious examples of **elder abuse**. The caregivers used their influence and superior position to virtually imprison the elderly, infirm, and dependent patient, preventing meaningful contact between her and her loved ones for the apparent purpose of having unencumbered access to her and to her wealth, and the caregivers used fraud and undue influence to gain access to the patient's assets and caused the patient to live in inhumane conditions. [Estate of Hoch v. Stifel, 2011 ME 24, 16 A.3d 137 \(Me. 2011\)](#).

There may be alternative statutory sources for obtaining punitive damages in a financial **elder abuse** case. Thus, in California, recovery may be had under either the **elder abuse** statute or under the general civil code provision governing punitive damages. Indeed, the California **elder abuse** statute expressly declares that its provisions do not affect the award of punitive damages under the Civil Code provision that governs them generally. [Cal. Welf. & Inst. Code § 15657.5](#). To recover punitive damages for financial abuse of an elder under the California **Elder Abuse** and Dependent Adult Civil Protection Act, the plaintiff must prove by clear and convincing evidence that the defendants have been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse. [Nieves v. JP Morgan Bank, N.A., 2012 WL 2873630 \(N.D. Cal. 2012\)](#) (under [Cal. Welf. & Inst. Code § 15657.5](#)). In the context of **elder abuse**, recklessness involves deliberate disregard of the high degree of probability that an injury will occur, and rises to the level of a conscious choice of a course of action with knowledge of the serious danger presented to others. [Nieves v. JP Morgan Bank, N.A., 2012 WL 2873630 \(N.D. Cal. 2012\)](#). Under the alternative authority for punitive damages in California, they are permitted only if the defendant has acted with oppression, fraud, or malice. [Cal. Welf. & Inst. Code § 3294](#). Malice is “despicable” conduct of the defendant with a “willful and conscious disregard of the rights or safety of others.” Oppression is “despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.” Fraud is an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. [Nieves v. JP Morgan Bank, N.A., 2012 WL 2873630 \(N.D. Cal. 2012\)](#).

A statute may provide protections to employers whose employees have committed egregious acts of abuse. Thus, in California, the standards set forth in [Cal. Welf. & Inst. Code § 3294\(b\)](#) for imposing punitive damages on an employer based upon the acts of an employee must be satisfied before any punitive damages are imposed against an employer found liable for financial abuse. This provision does not apply to the recovery of compensatory damages or attorney's fees and costs. [Cal. Welf. & Inst. Code § 15657.6\(c\)](#).

### § 37. Attorney's fees

Although attorney's fees in American litigation are ordinarily borne by each side, the rule is often different in financial **elder abuse** cases by virtue of fee-shifting provisions in the governing statutes. For example, in Arizona, since amendments to their



statute in 2012, the defendant “shall be subject to actual damages and reasonable costs and attorney fees.” [Ariz. Rev. Stat. Ann. § 46-456\(B\)](#). In Delaware, reasonable attorney's fees may be awarded. [Del. Code Ann. tit. 6, § 2583\(a\)](#). In Florida, the statute does not speak in mandatory terms, but is apparently discretionary, as it provides that a party who prevails in a financial **elder abuse** action “may be entitled to recover reasonable attorney's fees, costs of the action, and damages.” [Fla. Stat. Ann. § 415.1111](#). In California, where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in [section 15610.30](#), in addition to compensatory damages and all other remedies otherwise provided by law, the court must award to the plaintiff reasonable attorney's fees and costs. [Cal. Welf. & Inst. Code § 15657.5\(a\)](#).

### Illustrations:

An **elder abuse** unilateral fee shifting statute, which awarded the plaintiff who prevailed on a cause of action alleging financial abuse of an elder adult, precluded an award of attorney's fees to defendant escrow company, after the personal representative voluntarily dismissed overlapping **elder abuse** and tort claims against escrow company; all of the causes of action arose from a single transaction. [Wood v. Santa Monica Escrow Co.](#), 151 Cal. App. 4th 1186, 60 Cal. Rptr. 3d 597 (2d Dist. 2007).

A daughter, who filed a complaint alleging financial **elder abuse** against a son and his ex-wife on behalf of her mother's estate, was entitled to recover attorney's fees associated with the work her attorneys performed before a second complaint was filed. The initial complaint was filed and dismissed due to the daughter's failure to timely serve the complaint on the Attorney General, the complaint was re-filed and led to a judgment in the daughter's favor, and the work performed by the attorneys in relation to the filing of the first complaint aided in the preparation and presentation of the daughter's claims in the second complaint. [Fadel v. El-Tobgy](#), 245 Or. App. 696, 264 P.3d 150 (2011), review denied, 351 Or. 675, 276 P.3d 1123 (2012).

Attorney's fees may be available in some jurisdictions only in cases of higher degrees of culpability. For example, in Nevada, if it is established by a preponderance of the evidence that a person who is liable for damages for financial **elder abuse** acted with recklessness, oppression, fraud, or malice, the court must order the person to pay the plaintiff's attorney's fees and costs. [Nev. Rev. Stat. Ann. § 41.1395\(2\)](#).

### Practice Guide:

A plaintiff whose financial **elder abuse** cause of action was dismissed should not have its appeal rejected as moot even if the requested relief—such as rescission—was obtained under a separate claim, where the financial abuse claim entitles a prevailing plaintiff to attorney fees. [Church v. Woods](#), 190 Or. App. 112, 77 P.3d 1150 (2003).

## IV. Practice Checklists

### § 38. Checklist—Client intake (information from plaintiff)

The following information should be obtained by the plaintiff's counsel from a plaintiff seeking recovery for financial **elder abuse** under a state statute.

### BACKGROUND INFORMATION

# Identify person to serve as plaintiff, such as living victim, guardian, conservator, or successor

# If applicable, nature of plaintiff's representative capacity (for example, guardian ad litem, conservator, successor in interest)

# Plaintiff's full legal name

# Plaintiff's current address, phone numbers, e-mail address

# Victim's age at time alleged misconduct occurred

# Any mental infirmities victim had, such as dementia

# Names, address, and telephone numbers of treating physicians

# Names and titles, if applicable, of potential defendants, such as family members, banks, or investment brokers

#### **INFORMATION ON VICTIM'S ACCOUNTS, REAL PROPERTY AND OTHER ASSETS AT ISSUE**

# Names of victim's financial accounts, such as checking or brokerage accounts

# Victim's account numbers

# Identity of any joint accounts or jointly-held real estate titles

# Any other relevant documentation relating to accounts and property at issue

# Timeline of relevant dates relating to when defendant met, befriended, and exploited victim

# Whether plaintiff sought or obtained any legal, accounting, or other professional advice regarding the disputed transactions

# Any relevant documents, such as bank statements and credit card receipts

# Names and contact information of persons who may be witnesses, such as neighbors or bank employees

#### **§ 39. Checklist—Information from defendant**

The following information should be obtained by the defendant's counsel from a defendant contesting a claim of financial **elder abuse** under a state statute.



### **BACKGROUND INFORMATION**

# Defendant's full name

# Defendant's street address and business address, if applicable

# Defendant's status as beneficiary under victim's will, if applicable

# Defendant's relationship with victim, such as family member or business associate

# Duration and intimacy of relationship with victim

### **INFORMATION ON TRANSACTIONS AT ISSUE**

# Dates and amounts of any deposits of victim's funds into defendant's accounts

# Any jointly-titled assets or accounts with victim

# Any evidence of victim's consent to transactions at issue

# Any evidence that defendant's use of plaintiff's funds was for plaintiff's benefit

# Any business-related role or function of defendant justifying transaction

# Any power of attorney in connection with disputed transactions

# Any court orders potentially justifying disputed transactions

# Any evidence defendant lacked knowledge of wrongful nature of transaction

# Any evidence that disputed transaction was made in good faith to qualify for government aid, such as Medicaid.

# Contracts with plaintiff that include arbitration clause which may cover transaction

### **§ 40. Checklist—Plaintiff's discovery**

The following information should be sought by counsel for the plaintiff in pursuing a claim for financial **elder abuse** under a state statute.

# Facts concerning the disputed transactions or other actions taken regarding the funds or other property at issue

# Facts concerning the ownership, and possession or custody, of property at issue at all relevant times

# Facts relating to the debtor's knowledge of the facts and circumstances surrounding the transactions or other actions taken regarding the property at issue, as bearing on the defendant's actual or constructive knowledge

#### **§ 41. Checklist—Defendant's discovery**

The following information should be sought by counsel for the plaintiff in pursuing a claim for financial **elder abuse** under a state statute.

# Facts concerning the disputed transactions or other actions taken regarding the funds or other property at issue

# Facts concerning the ownership, and possession or custody, of property at issue at all relevant times

# Names or descriptions of any witnesses to the disputed transactions

### **V. Appendix**

#### **§ 42. Sample opinion synopsis**

##### **COA Synopsis**

In a recent Oregon case, the element of the defendant's knowledge of the wrongfulness of the **elder abuse** misconduct was addressed. In particular, a genuine issue of material fact existed on whether an attorney—who was a partner in an allegedly fraudulent property development company—merely received fraudulent financial figures from others and acted as a scrivener as to those numbers in preparing a covenant agreement in which investors were induced to invest in a fraudulent property development scheme, or whether the attorney had actual knowledge that the figures were fraudulent. Thus, summary judgment for the defendant was precluded in the action, which was brought by investors against the attorney, alleging fraud and financial **elder abuse**. *Cruze v. Hudler*, 246 Or. App. 649, 267 P.3d 176, R.I.C.O. Bus. Disp. Guide (CCH) ¶12148 (2011), opinion adhered to as modified on reconsideration, 248 Or. App. 180, 274 P.3d 858 (2012).

#### **§ 43. Sample complaint #1**

*[Adapted from 2012 WL 1361008, (April 4, 2012)]*

*[Caption]*

1. Fraud and Deceit through Intentional Misrepresentation

2. Fraud and Deceit through Concealment

3. Conversion
4. Negligent Breach of Contract
5. Breach of Fiduciary Duty
6. Unjust Enrichment
7. Financial **Elder Abuse**

Plaintiff's Complaint for Damages

*[Attorney name] [bar number] [address] [telephone number] [facsimile number] [Web address]*

Attorneys for Plaintiff *[name]*

DEMAND FOR JURY TRIAL

PRELIMINARY ALLEGATIONS

I. Plaintiff, *[name]*, a resident of *[county name]*, is at all times relevant in this complaint over 65 years old and is an elder as defined by the *[state elder abuse statute]*.

2. Defendant, *[name of individual defendant]*, is an individual and at all times relevant herein mentioned was a resident of *[name of county]*, State of *[name of state]*.

3. Defendant, *[bank name]*, a *[state name]* corporation, is, and at all times relevant herein mentioned, a corporation doing business in *[name of state]*.

4. PLAINTIFF does not know the true names of defendants DOES 1 through 100, inclusive, and therefore sues them by those fictitious names. PLAINTIFF is informed and believes that DOES defendants are residents of the *[name of state]*. PLAINTIFF will seek leave of the court to amend this complaint to set forth their true names when they are ascertained.

5. Each act alleged in the complaint herein was done with malice, oppression, or fraud and entitles PLAINTIFF to punitive and treble damages where allowed by law.

GENERAL BACKGROUND FACTS

6. In December 2011, PLAINTIFF fell down in his home and spent time in the hospital and a rehabilitation center to recover from his injuries.

7. While PLAINTIFF was in the hospital, it was discovered that *[individual defendant]* had a power of attorney for his finances. PLAINTIFF does not recall granting *[individual defendant]*, his neighbor, a power of attorney. *[Individual defendant]* fraudulently told PLAINTIFF'S caregiver, *[name of caregiver]*, that she only had the power of attorney for when PLAINTIFF was in the hospital.

8. While in the hospital *[individual defendant]* sold PLAINTIFF'S construction equipment for the purported purpose of paying for PLAINTIFF'S care, but the money was not used and PLAINTIFF never received any of the money.

9. After returning home from the hospital, PLAINTIFF asked *[caregiver's name]* why *[individual defendant]*'s name was on his checks. When *[caregiver's name]* was told PLAINTIFF that *[individual defendant]* had power of attorney, he was upset and did not understand why she had power of attorney. PLAINTIFF does not remember giving *[individual defendant]* power of attorney.

10. When *[caregiver's name]* confronted *[individual defendant]* about the checks and the power of attorney, *[individual defendant]* told *[caregiver's name]* that she would get *[bank defendant]* to send PLAINTIFF some checks with only his name on it so he would not be upset. *[Individual defendant]* also told *[caregiver's name]* not to take PLAINTIFF to *[bank defendant]*. PLAINTIFF is informed and believes that this was done to try and keep PLAINTIFF from discovering *[individual defendant]*'s theft.

11. PLAINTIFF was not receiving his bank statements. *[Individual defendant]* changed the mailing address so the bank statements only went to her address and *[individual defendant]* sorted through PLAINTIFF'S mail to make sure that PLAINTIFF never found out about the address change.

12. In January 2012, PLAINTIFF discovered that the bank statements were going to *[individual defendant]*'s address. PLAINTIFF asked *[bank defendant]* to send the bank statements to his address. When PLAINTIFF reviewed the statements, he discovered that *[individual defendant]* had stolen over \$100,000 from him.

13. *[Individual defendant]* stole the money through various transactions including large ATM cash withdrawals of \$500, paying personal financial responsibilities, and a cashier's check for \$582,233.14. *[Individual defendant]* is also in possession of PLAINTIFF'S title for his vehicles and home.

14. *[Individual defendant]* used the money she stole to make improvements to her own property located at *[address #1]*; *[individual defendant]* also used this money to pay of the *[bank defendant]* loan balance on a home she inherited located at *[address #2]*. *[Individual defendant]* told *[caregiver's name]* that "now she owned her mother's house."

15. When *[caregiver's name]* confronted *[individual defendant]* about the missing money, *[individual defendant]* told *[caregiver's name]* that it was none of her business and that this was a loan.

16. PLAINTIFF went to his *[bank defendant]* branch and spoke with *[name]* who claimed *[bank defendant]* was not responsible because there was a power of attorney. PLAINTIFF requested a copy of the power of attorney, and *[bank defendant]* said that "they would see if they could find it." PLAINTIFF has not received a copy of the power of attorney.

17. Upon discovery of the theft, PLAINTIFF closed his account, but kept a small balance in it per *[bank defendant]*'s request to prevent any overdraft issues. PLAINTIFF checked the account a few days later and saw that there was \$9,000 in the account.

18. PLAINTIFF is informed and believes that *[individual defendant]* returned some of the money she stole when her theft was uncovered. PLAINTIFF is informed and believes that *[bank defendant]* continued to allow *[individual defendant]* to use the account even when notified of her theft and told to close the account.

19. When PLAINTIFF discovered that he had the money in his account, he also found out that he had multiple accounts with *[bank defendant]*, but was not notified of them when he closed his account a few days prior. *[Bank defendant]* assisted *[individual defendant]*'s theft and **elder abuse** by negligently breaching their contractual obligations to PLAINTIFF and retaining stolen property when PLAINTIFF notified them of the theft.

20. PLAINTIFF is informed and believes that *[bank defendant]* allowed *[individual defendant]* to gain access to the account based on forged/fraudulently obtained documents purported to be signed PLAINTIFF.

21. *[Bank defendant]* was on notice based on the large withdrawals on the account and change of address request that occurred immediately after *[individual defendant]* was added to the account.

22. When PLAINTIFF advised *[bank defendant]* that *[individual defendant]* had stolen PLAINTIFF'S money, *[bank defendant]* falsely and fraudulently advised PLAINTIFF that they had no legal responsibility for their involvement in the *[individual*

*defendant*]'s conduct or to reimburse his account. These statements made by *[bank defendant]* were false and were made with the intent to deceive PLAINTIFF so he would defer bringing legal action against *[bank defendant]*.

23. The *[bank defendant]* account's mailing address was fraudulently changed to the *[individual defendant]*'s residence and statements were no longer sent to PLAINTIFF. The exact date of this change is unknown, but, PLAINTIFF is informed and believes that no bank statements were sent to his residence from October 2011 to January 2012.

#### FIRST CAUSE OF ACTION: FRAUD AND DECEIT-INTENTIONAL MISREPRESENTATION

*[Against All Defendants and DOES 1-100, Inclusive]*

24. PLAINTIFF repeats and re-alleges paragraphs 1 through 23 above and incorporates them herein by reference as though set forth in full.

25. In committing the wrongful acts alleged herein defendants engaged in deceit by making intentional misrepresentations in order to deprive PLAINTIFF of personal property, financial assets, money, and legal rights.

26. *[Individual defendant]*'s conduct was false and fraudulent when she stole PLAINTIFFS money by fraud/forging a power of attorney, claiming to only be handling PLAINTIFF'S bills while he was in the hospital and stealing the proceeds from the sale of his construction equipment intended to raise funds for PLAINTIFF'S care.

27. When *[individual defendant]*'s conduct, in stealing PLAINTIFF'S money by fraudulently obtaining/forging a power of attorney and fraudulently changing the mailing address on PLAINTIFF'S bank account, was brought to *[bank defendant]*'s attention, *[bank defendant]* falsely and fraudulently advised PLAINTIFF that they had no legal responsibility for their involvement in *[individual defendant]*'s conduct or to reimburse, release, or return the stolen funds to PLAINTIFF'S *[bank defendant]* account.

28. As a result of defendants' fraud and deceit, PLAINTIFF was harmed and has suffered financial and emotional losses in an amount to be proven at trial.

29. The actions complained of herein were done by defendants maliciously, fraudulently, and oppressively, by reason whereof PLAINTIFF is entitled to an award of punitive damages, the amount of such damages to be established by proof at trial.

#### SECOND CAUSE OF ACTION: FRAUD AND DECEIT-CONCEALMENT

*[Against All Defendants and DOES 1-100, Inclusive]*

30. PLAINTIFF repeats and re-alleges paragraphs 1 through 29 above and incorporates them herein by reference as though set forth in full.

31. In committing the wrongful acts alleged herein, defendants concealed and /or suppressed material facts in order to deprive PLAINTIFF of personal property, financial assets, money, and legal rights.

32. As set forth above, *[individual defendant]* concealed material facts from PLAINTIFF in multiple ways. *[Individual defendant]* concealed the fact that she was stealing from PLAINTIFF'S bank accounts. *[Individual defendant]* concealed the fact that she was using PLAINTIFF'S money to pay her own financial obligations. *[Individual defendant]* concealed the fact that she sold PLAINTIFF'S equipment and kept the proceeds for herself. *[Individual defendant]* concealed the fact that she forged/fraudulently obtained a power of attorney.

33. When *[individual defendant]*'s conduct, stealing PLAINTIFF'S money by fraudulently inducing/forging a power of attorney and fraudulently changing the mailing address on PLAINTIFF'S bank account, was brought to *[bank defendant]*'s attention, *[bank defendant]* fraudulently concealed the fact that they were legally responsible for restoring all of the money taken from the

account via the forged/fraudulently obtained power of attorney because PLAINTIFF was not on notice of the large withdrawals because *[bank defendant]* was not sending him statements and because *[bank defendant]* was a recipient of stolen property.

34. PLAINTIFF advised *[bank defendant]* as soon as he found out that *[individual defendant]* had forged/fraudulently obtained the power of attorney and had no authority to access his account. *[Bank defendant]* had a fiduciary obligation to PLAINTIFF as depositor to advise PLAINTIFF of his legal right to recover money that was stolen as a result of *[bank defendant]*'s own negligence.

35. As a result of defendants' fraud and deceit, PLAINTIFF was harmed and has suffered financial and emotional losses in an amount to be proven at trial.

36. The actions complained of herein were done by defendants maliciously fraudulently, and oppressively, by reason whereof PLAINTIFF is entitled to an award of punitive damages, the amount of such damages to be established by proof at trial.

### THIRD CAUSE OF ACTION: CONVERSION

*[Against All Defendants and DOES 1-100, Inclusive]*

37. PLAINTIFF repeats and re-alleges paragraphs 1 through 36 above and incorporates them herein by reference as though set forth in full.

38. Through selling plaintiffs personal property, large ATM cash withdrawals, paying for personal financial obligations, and the \$82,233.14 cashier's check *[individual defendant]* has stolen and denied PLAINTIFF the right to ownership of personal property owned by PLAINTIFF.

39. *[Individual defendant]* has stolen and refused to return the money and assets stolen from PLAINTIFF'S banking accounts and other personal property including construction equipment.

40. *[Individual defendant]* has ignored PLAINTIFF'S request that she return these items, which were stolen from him.

41. *[Bank defendant]* received PLAINTIFF'S property when *[individual defendant]* used PLAINTIFF'S *[bank defendant name]* checking account to pay off a *[bank defendant]* home loan.

42. When PLAINTIFF notified *[bank defendant]* of the theft from his account, *[bank defendant]* claimed that it bore no legal responsibility for what happened, effectively refusing to return PLAINTIFF'S money.

43. As a result of defendants' conversion, PLAINTIFF was harmed and have suffered financial and emotional losses in an amount to be proven at trial.

44. The actions complained of herein were done by defendants maliciously, fraudulently, and oppressively, by reason whereof PLAINTIFF is entitled to an award of punitive damages, the amount of such damages to be established by proof at trial.

### FOURTH CAUSE OF ACTION: NEGLIGENT BREACH OF CONTRACT

*[Against Defendants [bank defendant] and DOES 51-100, Inclusive]*

45. PLAINTIFF repeats and re-alleges paragraphs 1 through 44 above and incorporates them herein by reference as though set forth in full.

46. PLAINTIFF had a relationship with defendant *[bank defendant]* that was based on a written contract. Although PLAINTIFF performed his contractual obligations, *[bank defendant]* negligently breached its contractual obligations and duties to PLAINTIFF as described herein.

47. PLAINTIFF had checking and savings accounts with *[bank defendant]* that were governed by a written depositor agreement.

48. The depositor agreement provided that *[bank defendant]* would not make changes on the account without the account holder's authorization and that *[bank defendant]* would provide the account holder with regular statements.

49. *[Bank defendant]* negligently breached these obligations by changing the mailing address for the account statements to *[individual defendant]*'s residence without PLAINTIFF'S authorization.

50. In changing the mailing address for the statements, *[bank defendant]* breached its contractual obligation to provide the account holder with monthly statements.

51. PLAINTIFF is informed and believes and thereon alleges that *[individual defendant]* made numerous bank teller transactions at a *[bank defendant]* branch. PLAINTIFF further alleges that *[bank defendant]* was negligent for not inquiring into the legitimacy of the power of attorney and verifying signatures against the signature cards they had on file.

52. PLAINTIFF is informed and believes and thereon alleges that there was a pattern of banking transactions on the *[bank defendant]* account that should have alerted *[bank defendant]* that identity theft and fraud was occurring and that *[bank defendant]* had an obligation to the account holders to detect that activity and report to the account holder and law enforcement and they negligently failed to do so.

53. As a result of each of *[bank defendant]*'s negligent breach of contract as described herein, PLAINTIFF was harmed.

54. As a result of each of *[bank defendant]*'s negligent breach of contract as described herein, PLAINTIFF has suffered financial losses in an amount to be proven at trial.

#### FIFTH CAUSE OF ACTION: BREACH OF FIDUCIARY DUTY

*[Against All Defendants and DOES 1-100, Inclusive]*

55. PLAINTIFF repeats and re-alleges paragraphs 1 through 54 above and incorporates them herein by reference as though set forth in full.

56. Defendant *[individual defendant]* owed a fiduciary duty to PLAINTIFF by virtue of his purported relationship created by the forged/fraudulently obtained power of attorney.

57. Defendant *[bank defendant]* owed a fiduciary duty to PLAINTIFF by virtue of its relationship with PLAINTIFF as account holder and depositor.

58. Among the various obligations and responsibilities owed to PLAINTIFF, defendants were to deal with him at all times with honesty and in good faith. Defendants were obligated to put PLAINTIFF'S interests above their own. This required that defendants not misrepresent facts or withhold facts.

59. As alleged herein, *[individual defendant]* concealed material facts from PLAINTIFF in multiple ways. *[Individual defendant]* concealed the fact that she was stealing from PLAINTIFF'S bank accounts. *[Individual defendant]* concealed the fact that she was using PLAINTIFF'S money to pay her own financial obligations. *[Individual defendant]* concealed the fact that she sold his equipment and kept the proceeds for herself. *[Individual defendant]* concealed the fact that she forged/fraudulently obtained a power of attorney. *[Individual defendant]* also misrepresented the scope of the purported power of attorney.

60. As alleged herein, *[bank defendant]* made certain misrepresentations to PLAINTIFF regarding its legal responsibility to remedy *[individual defendant]*'s illegal conduct and withheld information regarding its legal responsibility to restore money that was stolen through the forged/fraudulently obtained power of attorney and other means.



61. At all times herein relevant to this case, PLAINTIFF justifiably relied upon defendants' actions, conduct, misrepresentations, omissions, and concealments and did so to his detriment and substantial damage. PLAINTIFF was particularly vulnerable due to the fact that he is an elder dependent adult as defined by the *[financial elder abuse statute]* and he was not sophisticated in financial and legal matters.

62. The actions complained of herein were done by defendants maliciously, fraudulently, and oppressively, by reason whereof PLAINTIFF is entitled to an award of punitive damages, the amount of such damages to be established by proof at trial.

#### SIXTH CAUSE OF ACTION: CONSTRUCTIVE TRUST UNJUST ENRICHMENT

*[Against [individual defendant] and DOES 1-49, Inclusive]*

63. PLAINTIFF repeats and re-alleges paragraphs 1 through 62 above and incorporates them herein by reference as though set forth in full.

64. As alleged herein above, *[individual defendant]* deceived, defrauded and stole assets from PLAINTIFF and some of those assets have been invested in *[address #1]* and *[address #2]*. *[Individual defendant]*'s fraudulent conduct has caused PLAINTIFF damage and *[individual defendant]* has been unjustly enriched and benefited from the same. PLAINTIFF is informed and believes and thereon alleges that *[individual defendant]* has invested, maintained, used, and benefited from her fraudulently obtained assets, which PLAINTIFF is entitled to a constructive trust on. PLAINTIFF seeks the right to trace, and determine where said stolen assets are how they have been used, and how they have been or are being maintained. PLAINTIFF is informed and believes and thereon alleges that *[individual defendant]* has wrongfully profited from the frauds she has perpetrated on the PLAINTIFF.

65. *[Individual defendant]* would be unjustly enriched if she were allowed to retain the proceeds of wrongfully obtained profit and benefits. PLAINTIFF is informed and believes and thereon alleges the legal remedy of damages is inadequate due to the fact that *[individual defendant]* may have insufficient financial assets to respond to an award of damages herein. PLAINTIFF requests that a constructive trust be imposed on all benefits obtained, achieved by *[individual defendant]* or on monies, proceeds, or benefits that *[individual defendant]* has received, constructively or otherwise, as a result of her fraudulent conduct. PLAINTIFF requests the right to trace property rights and interests.

#### SEVENTH CAUSE OF ACTION: FINANCIAL ELDER ABUSE

*[Against All Defendants and DOES 1-100, Inclusive]*

66. PLAINTIFF repeats and re-alleges paragraphs 1 through 65 above and incorporates them herein by reference as though set forth in full.

67. Defendants have violated *[state elder abuse statute]* by taking financial advantage of PLAINTIFF and stealing or assisting in stealing assets from PLAINTIFF.

68. Defendants have wrongfully taken, hidden, misappropriated, stolen, and/or retained property belonging to PLAINTIFF with the intent to defraud or through their negligent conduct have assisted in doing the same.

69. Defendants are jointly liable for the wrongful acts alleged in this complaint because PLAINTIFF is informed and believes and thereon alleges that defendants engaged in a conspiracy to commit the acts alleged and/or through negligent conduct assisted, aided, and abetted one another in wrongfully taking, secreting, appropriating, obtaining, and retaining assets belonging to PLAINTIFF with the intent to defraud as alleged herein.

70. At the time defendants committed these acts, PLAINTIFF was older than *[60]/[65]* years of age.

71. As a result of defendants' wrongful conduct, PLAINTIFF was harmed.



72. As a result of defendants' wrongful conduct, PLAINTIFF has suffered financial losses in an amount to be proven at trial.

73. As a direct further proximate result of the actions of the defendants, PLAINTIFF suffered severe emotional distress and mental anguish, and has been damaged thereby; the amount of such damages will be established by proof at trial.

74. The actions complained of herein were done by defendants maliciously, fraudulently, and oppressively, and thus the PLAINTIFF is entitled to an award of punitive and treble damages, the amount of such damages to be established by proof at trial.

75. PLAINTIFF is entitled to an award of reasonable attorney's fees in connection with the prosecution of this action.

76. PLAINTIFF is entitled to prejudgment interest under and by virtue of any provision of law entitling them thereto.

WHEREAS, PLAINTIFF prays judgment against Defendants, and each of them:

1. For general damages according to law and proof;
2. For special damages according to law and proof;
3. For defendants to return all of PLAINTIFF'S property;
4. For statutory damages;
5. For treble damages pursuant to *[statutory cite]*;
6. For all allowable damages pursuant to the Welfare and Institutions Code Sections;
7. For punitive damages;
8. For prejudgment interest according to law;
9. For costs of suit;
- 10a. For attorney's fees as allowed by law;

OR

- 10b. For attorney's fees as allowed by *[statutory cite]*;
11. For such other and further relief as the court may deem proper.

Dated:

*[date]*

/s/

*[Law Firm name]*

*[Attorney name]*

Attorney for PLAINTIFF

*[Name of plaintiff]*

#### § 44. Sample complaint #2

[Adapted from 2006 WL 5895095 (Mass.Super.) (Trial Pleading). For opinion, see 2007 WL 5312721 (Trial Order), 2007 WL 5312722 (Trial Order), 2007 WL 5312723 (Trial Order), 2007 WL 5312724 (Trial Order)]

[Caption]

Complaint

Respectfully submitted, Plaintiff, by his attorney, [Attorney name] [bar number] [address] [telephone number] [facsimile number] [Web address]

Attorneys for Plaintiff [name]

[County name], ss

#### INTRODUCTION

This is a civil action involving an elderly man who is physically and mentally weak. In this action, the Defendants have preyed on the Plaintiff by the exertion of undue influence and deceit. As a result of the Defendants' wrongful acts, the Plaintiff was defrauded out of financial assets, has had his credit history destroyed, is presently in jeopardy of having his home foreclosed upon, and is experiencing severe emotional distress.

#### PARTIES

1. Plaintiff, [name], is an individual residing in [name of county] County, [name of state].
2. Defendant, [name1], is an individual residing in [name of county] County, [name of state].
3. Defendant, [name2], is an individual residing in [name of county] County, [name of state].

#### FACTUAL ALLEGATIONS

4. The plaintiff is an 89-year-old retired veteran.
5. Plaintiff met the Defendant, [name1], approximately 15 years ago. [Name1] later introduced the plaintiff to Defendant [name2].
6. Over time, defendant [name1] became increasingly dominating over the plaintiff.
7. In 1997, defendant [name1] attempted to pressure the plaintiff and his daughter, [name], to sell the plaintiff's residence at [address] and to allow him to manage the plaintiff's assets.
8. The plaintiff and [daughter's name] owned the property jointly and [daughter's name] refused to agree to such an agreement. The property at this time was free and clear of liens and mortgages.
9. The following year, in 1998, defendant [name1], with the assistance of his now-wife, defendant [name2], caused [daughter's] name to be removed from the title of the real estate. Under information and belief, [name1] caused [daughter] signature to be forged on the deed to the property. [Name2] was also the notary on the deed. See Exhibit A: Deed dated April 1, 1998.
10. [Daughter] only became aware of the 1998 transfer in June 2006.
11. Immediately after fraudulently causing [daughter's] name to be removed from the title of the plaintiff's property, defendants coerced the plaintiff into refinancing his home and providing them \$30,000.

12. Defendants represented to the plaintiff that they needed \$30,000 to purchase property in *[address]* and they were at risk of losing their investment deposit of \$120,000 without the plaintiff's financial backing.
13. The plaintiff did not want to refinance his residence and provide the defendants with any money. The defendants, however, continually badgered the plaintiff and the plaintiff began to feel intimidated by the defendants' actions.
14. Defendants represented to the plaintiff that they would repay the plaintiff's refinance mortgage within three months by refinancing the property they intended to purchase.
15. However, instead of satisfying the mortgage in three months, the defendants sought the plaintiff's agreement for them to make monthly payments on the mortgage until it was discharged.
16. To date, approximately eight years later, the Defendants have failed to discharge the mortgage on plaintiff's property.
17. After unduly influencing the plaintiff to take out a mortgage on his residence, the defendants continued to prey on plaintiff's susceptibility and coerced plaintiff to provide them additional money and credit.
18. Defendant *[name1]* persuaded plaintiff to write him additional checks totaling \$5,000.
19. Defendant *[name2]* coerced the plaintiff into providing her with checks totaling \$8,000. See Exhibit B: All checks dated May 19, 1998.
20. The checks to the defendants were drawn on plaintiff's *[bank account]*, and *[name of card issuer]* credit card accounts.
21. In addition, the defendants obtained plaintiff's credit cards and made personal charges without the plaintiff's knowledge or consent.
22. Also, the defendants, without plaintiff's consent, changed the mailing addresses on many of the credit card accounts so that the statements were sent directly to them.
23. The defendants failed to pay the plaintiff's credit card balances and, as a result, plaintiff has been sued by several credit card companies for the collection of delinquent charges caused by the defendants.
24. When the plaintiff discovered that he was being sued, the defendants, in yet a further attempt to conceal their misconduct, told the plaintiff that they would appear in court and settle the matters.
25. Defendants failed to settle the matters and several judgments have been issued against the plaintiff for the defendants' unpaid credit card charges.
26. Plaintiff filed a complaint on the defendants on March 31, 2004, and voluntarily decided to dismiss the case since the defendants promised that the debt would be satisfied without litigation. To date, over two years later, the defendants have failed to satisfy these debts.
27. At least one Judgment Creditor, *[name]*, has received an execution on their Judgment and has now levied upon, seized, and taken the right, title, and interest in plaintiff's *[address]* property. See Exhibit C: Execution dated September 14, 2006.
28. Plaintiff faces another court appearance in the *[court]* District Court on December 5, 2006, regarding credit card debt incurred by the defendants that they were obligated to and promised to pay.

29. Due to defendants' financial exploitation of the plaintiff, a representative at *[elder services]* has filed a report with the District Attorney in *[name of county]* County.

30. The defendants' conduct has caused the plaintiff severe emotional distress. In December 2002, plaintiff suffered a stroke.

31. Plaintiff's emotional distress continued to worsen as creditors were constantly contacting him. Plaintiff's doctor has expressed concerns that such emotional distress may contribute to the likelihood of subsequent strokes.

#### COUNT I FRAUD

32. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 31 of this complaint as if fully set forth herein.

33. As a result of the above stated facts, the defendants' actions constitute fraud.

34. Plaintiff suffered actual damages as a direct and proximate cause of the defendants' fraudulent conduct.

#### COUNT II UNDUE INFLUENCE

35. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 34 of this complaint as if fully set forth herein.

36. As a result of the above stated facts, the defendants' intentional preying on the plaintiff's susceptibility constitutes undue influence.

37. Plaintiff suffered actual damages as a direct and proximate cause of the defendants' undue influence.

#### COUNT III BREACH OF CONTRACT

38. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 37 of this complaint as if fully set forth herein.

39. As a result of the above stated facts, the defendants' actions constitute breach of contract.

40. Plaintiff suffered actual damages as a direct and proximate cause of the defendants' breach of contract.

#### COUNT IV BREACH OF FIDUCIARY DUTY

41. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 40 of this complaint as if fully set forth herein.

42. As a result of the above stated facts, the defendants' actions constitute a breach of fiduciary duty.

43. Plaintiff has suffered actual damages as a direct and proximate result of defendants' breach of fiduciary relationship.

#### COUNT V BREACH OF CONFIDENTIAL DUTY

44. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 43 of this complaint as if fully set forth herein.

45. As a result of the above stated facts, the defendants' actions constitute a breach of confidential duty.

46. Plaintiff has suffered actual damages as a direct and proximate result of defendants' breach of confidential duty.

#### COUNT VI NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

47. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 46 of this complaint as if fully set forth herein.

48. As a result of the above stated facts, the defendants' actions caused the plaintiff emotional distress.

49. Plaintiff's emotional distress has caused physical manifestations; the plaintiff suffered a stroke and due to the increasing severity of the situation, is at risk of another stroke that may lead to his death.

#### COUNT VII INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

50. The plaintiff repeats and re-alleges the allegations in paragraphs 1 through 49 of this complaint as if fully set forth herein.

51. As a result of the above stated facts, the defendants' actions constitute calculated actions intended to cause plaintiff emotional distress and defendants knew their actions were causing plaintiff severe emotional distress.

52. Defendants' conduct was extreme and outrageous; it was beyond all possible all possible bounds of decency.

53. The defendants' actions are the cause of the plaintiff's distress.

54. The emotional distress sustained by the plaintiff is severe and of a nature that no reasonable man could be expected to endure.

#### PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS

Dated:

*[date]*

Respectfully submitted,

Plaintiff,

By his/her attorney,

/s/

*[Law Firm name]*

*[Attorney name]*

Attorney for PLAINTIFF

*[Name of plaintiff]*

#### § 45. Sample notice of removal of action to federal district court based on federal question

*[Adapted from 2012 WL 2792593 (C.D.Cal.)]*

*[Caption]*

Notice of Removal of Action Based on Federal Question

*[Attorney name] [bar number] [address] [telephone number] [facsimile number] [Web address]*

Attorneys for Plaintiff *[name]*

28 U.S.C.A. § 1331

Complaint filed: June 21, 2012

Trial Date: None Set

*[Removal from [name of court], County of [county name] Case No. AB123456]*

*[Defendants], defendants in [case name], filed in the [court name] of the State of [name of state] for the County of [county name], Case Number AB123456, [State Court Action], which action was filed on June 21, 2012, and had not been served on Defendants, and gives notice pursuant to 28 U.S.C.A. § 1331 of the removal of that action to this Court, and shows unto the Court the following:*

#### I. ALL PROCEDURAL REQUIREMENTS OF REMOVAL HAVE BEEN SATISFIED

1. Plaintiffs *[name #1]* and *[name #1]*, (collectively, "Plaintiffs") filed a complaint in the State Court Action on June 21, 2012. True and correct copies of all pleadings Defendant OCWEN has received in this matter are attached hereto as Exhibit "A." Additionally, a true and correct copy of the Los Angeles court docket is attached hereto as Exhibit "B." Defendants have not been properly served in this action, but learned of it when copies of the complaint were delivered to the office of counsel for

Defendants. Plaintiffs' Complaint is ripe for removal as the Defendants are filing this removal within 30 days receipt of the State Court Action.

2. Plaintiffs' lawsuit arises from a dispute regarding a foreclosure of the Deed of Trust secured by the property located at [address].

3. Plaintiff alleges 13 causes of action for 1) fraud; 2) cancellation of written instruments; 3) elder financial abuse in violation of [state financial **elder abuse** statute]; 4) violation of the [state consumer protection act] violation of the [unfair and deceptive practices act]; 5) in violation of the Truth in Lending Act, failure to timely provide truth in lending disclosure and notice to rescind the deed of trust; 6) fraud by concealment; 7) violation of the Home Ownership Equity Protection Act (HOEPA); 8) wrongful foreclosure; 9) promissory estoppel; 10) unfair debt collection practices; 11) slander of title; and 12) quiet title.

4. This Notice of Removal is brought by Defendants.

5. Removal of this action is timely. Plaintiff's complaint was filed on June 21, 2012. Defendants have not been served with the complaint but learned of it when copies were received at the office of counsel for Defendants. Removal therefore comports with the timing requirements of [28 U.S.C.A. § 1446](#).

6. No previous request has been made for the relief requested.

7. Based upon review of information contained on the state court's docket, DOES 1-100 have not been named or served, and their consent is not required. [case citation] (requiring consent only from defendants "properly joined and served in the action").

8. The Central District of [name of state] is the proper venue for removal. The [court name] of [name of state] for the County of [county name] is located within the Central District of [name of state]. See [28 U.S.C.A. § 84\(b\)](#). Thus, venue is proper in this court because it is the district and division embracing the place where such action is pending.

9. This action is removable to the instant Court because it could have been filed in this court pursuant to [28 U.S.C.A. § 1441\(b\)](#) as it presents federal questions.

## II. FEDERAL QUESTION: REMOVAL IS PROPER BECAUSE JURISDICTION EXISTS PUSUANT TO [28 U.S.C.A. § 1331](#)

10. This action could have been originally filed in this Court pursuant to [28 U.S.C.A. § 1441\(a\)](#) because substantial federal questions are alleged in the Complaint, and thus jurisdiction exists as conferred by [28 U.S.C.A. § 1331](#).

11. The Complaint includes claims that are based on violation of the Truth in Lending Act, [15 U.S.C.A. §§ 1601 et seq.](#), in the fifth cause of action, and violation of the Home Ownership Equity Protection Act, [15 U.S.C.A. §§ 1602\(aa\) and 1639](#), in the seventh cause of action. Plaintiff's right to relief, if any, depends upon the resolution of substantial federal questions related to whether Defendants failed to comply with the provisions of the aforementioned statutes. Accordingly, these claims are subject to this Court's federal question jurisdiction as set forth by [28 U.S.C.A. § 1331](#).

12. Supplemental jurisdiction exists with respect to any remaining claims pursuant to [28 U.S.C.A. § 1367](#).

WHEREFORE, Defendants respectfully remove this action from the [state trial court] for the County of [county name] to this Court pursuant to [28 U.S.C.A. § 1331](#).

Dated: June 28, 2012

Law firm name

A Professional Corporation



*Attorney name*

*Attorney for Defendant*

*defendant name*

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## RESEARCH REFERENCES

### West's Key Number Digest

West's Key Number Digest, [Protection of Endangered Persons](#)  7, 10, 12, 15

### Westlaw Databases

[Advising the Elderly Client \(ADVELD\)](#)

[Advising the Elderly Client—Guardianship and Conservatorship \(ADVELD-GUARD\)](#)

[Advising the Elderly Client—Housing \(ADVELD-HSG\)](#)

[Elderlaw: Advocacy for the Aging \(ELDERLAW\)](#)

[Medicare and Medicaid Fraud and Abuse \(MEDFRAUD\)](#)

[Myers on Evidence in Child, Domestic and \*\*Elder Abuse\*\* Cases \(MYEREV\)](#)

[Frolik and Brown: Advising the Elderly or Disabled Client \(WGL-ADVELDER\)](#)

[Begley and Barrett: Representing the Elderly or Disabled Client \(WGL-REPELDER\)](#)

### A.L.R. Library

[A.L.R. Index, Age](#)

[A.L.R. Index, Attorney or Assistance of Attorney](#)

[A.L.R. Index, Attorneys' Fees](#)

[A.L.R. Index, Capacity or Incapacity](#)

[A.L.R. Index, Descent and Distribution](#)

[A.L.R. Index, Disabled Persons](#)

[A.L.R. Index, Duress and Coercion](#)

[A.L.R. Index, Family, Relatives, and Households](#)

[A.L.R. Index, Guardian and Ward](#)

[A.L.R. Index, Incompetent and Insane Persons](#)

[A.L.R. Index, Medicaid](#)

[A.L.R. Index, Nursing and Convalescent Homes](#)

[A.L.R. Index, Senior Citizens](#)

[A.L.R. Index, Trusts and Trustees](#)

[A.L.R. Index, Undue Influence](#)

[A.L.R. Index, Wills](#)

[West's A.L.R. Digest, \[Protection of Endangered Persons\]\(#\) !\[\]\(5ca7d0bd23567a9aa1f800590644baea\_img.jpg\) 7, 10, 12, 15](#)

[Validity, Construction, and Application of State Civil and Criminal \*\*Elder Abuse\*\* Laws, 113 A.L.R.5th 431](#)

### Trial Strategy

[Proof of \*\*Elder Abuse\*\* in Civil and Criminal Actions, 118 Am. Jur. Proof of Facts 3d 297](#)

[Proof of Abuse, Neglect or Exploitation of Older Persons, 53 Am. Jur. Proof of Facts 3d 1](#)

[Cause of Action for Reverse Redlining or Predatory Home Mortgage Lending Under Fair Housing Act \[42 U.S.C.A. § 3605\], 49 Causes of Action 2d 209](#)

[Cause of Action to Set Aside or Recover for Fraudulent Transfer or Obligation under Uniform Fraudulent Transfer Act, 26 Causes of Action 773](#)

## Law Reviews and Other Periodicals

Culley & Sanders, [Exploitation and Abuse of the Elderly During the Great Recession: A Maine Practitioner's Perspective](#), 62 Me. L. Rev. 429 (2010)

Rathbun, [Marrying Into Financial Abuse: A Solution to Protect the Elderly in California](#), 47 San Diego L. Rev. 227 (2010)

Vanarelli, CELA, [Financial Exploitation of the Elderly: Impact on Medicaid Eligibility](#), 6 NAELA J. 39 (2010)

Vu-Dinh, [Reforming Power of Attorney Law to Protect Alaskan Elders From Financial Exploitation](#), 27 Alaska L. Rev. 1 (2010)

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## Footnotes

- \* Mr. Buchwalter contributes to several legal reference publications, including Corpus Juris Secundum, American Law Reports, and Causes of Action 2d. He served as a judicial law clerk to Bankruptcy Judge John J. Hargrove, Southern District of California. As a law student, Mr. Buchwalter interned as a judicial law clerk to Federal District Judge Charles S. Haight, Jr., of the Southern District of New York, and with the staff attorney's office in that district, handling (among other matters) prisoners' pro se civil-rights claims. Mr. Buchwalter holds a J.D. from Hofstra University School of Law, as well as an M.A. in philosophy from the City University of New York Graduate Center with an emphasis in the philosophy of law. He is admitted to practice law in the State of New York.

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